Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MARY DECKER SLANEY,
Petitioner,

v.

THE INTERNATIONAL AMATEUR ATHLETIC FEDERATION and THE UNITED STATES OLYMPIC COMMITTEE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES E. COLEMAN, JR.
Counsel of Record
DUKE UNIVERSITY SCHOOL OF LAW
BOX 90360
DURHAM, NC 27708-0360
(919) 613-7057

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Does the determination of an Olympic athlete's eligibility to compete by an international sports federation automatically constitute an arbitration award under the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards barring litigation of the athlete's state law claims against the federation for the unlawful and tortious manner in which its eligibility rules were implemented?

2. Does the United States Olympic Committee's exclusive jurisdiction under the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 et. seq., to determine the eligibility of American athletes to compete in Olympic sports immunize it from liability under state law for the unlawful and tortious manner in which it makes such eligibility determinations?

PARTIES TO THE PROCEEDINGS

Petitioner

Mary Decker Slaney. Petitioner is an individual and has no corporate affiliates.

Respondents

The United States Olympic Committee and The International Amateur Athletic Federation.

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BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on March 27, 2001. This petition for a writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 201[1] (App. F at 100a)

36 U.S.C. § 220503 (App. F at 100a-101a)

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36 U.S.C. § 220522 (App. F at 102a-103a)

36 U.S.C. § 220523 (App. F at 103a-104a)

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[1] The text of the relevant provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is set out in the Appendix hereto (App. D at 89a-91a).

STATEMENT OF THE CASE

This case arises out of a urine sample that Petitioner[2] provided to Respondent United States Olympic Committee[3] (USOC) on June 17, 1996, at the 1996 Olympic Trials in Atlanta so that it could be tested for the presence of performance enhancing substances, including exogenous testosterone.[4] The UCLA Olympic Laboratory, under

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[2] Petitioner has competed internationally and nationally in the sport of track and field for more than twenty-five years. She has been a member of three United States Olympic teams, and has held American and world records for all distances between 800 meters and 10,000 meters. She was the 1983 World Champion in the 1500 and 3000 meter events. Petitioner is considered one of the greatest female athletes in this country's history.

[3] The USOC, located in Colorado Springs, Colorado, is the National Olympic Committee for the United States. As such, the USOC is charged with carrying out the mission of the International Olympic Committee ("IOC") and the Olympic Movement in this country. Because the IOC has promulgated a drug testing program, the USOC administers that program in the United States for all qualifying competitions for the Olympic Games.

[4] The USOC itself was responsible for collecting, transporting, and testing urine samples provided by athletes at the 1996 Olympic Trials. Complaint ¶¶ 33, 34, 35. Under USOC rules, "[i]n consideration for the privilege of competing at such an event, an athlete agrees to be subject to the provisions of [the USOC drug testing] Program applicable to [in-competition] testing." Complaint ¶ 34. In the course of her career, Petitioner had been subjected to hundreds of such tests. Prior to 1996, she had never tested positive for doping, and never had been accused or suspected of using performance enhancing substances.

contract with the USOC, analyzed the sample, and subsequently reported to the USOC that Petitioner's sample was suspicious for the presence of exogenous testosterone. As the Court of Appeals notes, however, "proving the presence of exogenous testosterone in the body by scientific tests is not possible at the present time." (App. A at 20a). That undisputed fact is at the core of Petitioner's state law claims against both Respondents. Respondents caused Petitioner irreparable harm when they intentionally and publicly accused and convicted her of cheating, based on a test that they knew in fact did and could not prove that Petitioner had cheated within the meaning of their own rules on drug testing or "doping." As a result, Petitioner's reputation, the extraordinary accomplishments of her athletic career, and her future ability to earn a living in her sport have been destroyed or put under an indelible cloud. Both Respondents claim immunity for that harm, and the decision of the Court of Appeals provides it. The decision, unless reversed, permits Olympic sports organizations to make eligibility determinations arbitrarily, discriminatorily, and unfairly with impunity.

Under the rules of Respondent International Amateur Athletic Federation (IAAF),[5] the "offence of doping takes

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Complaint ¶¶ 2, 4, 32.

[5] The IAAF is an unincorporated organization based in Monaco. It was founded to coordinate and control track and field activities around the world. The IAAF has a membership of national federations representing over 200 nations and territories. It establishes worldwide rules for track and field competitions which are embodied in the IAAF Constitution and other regulations. Each member federation governs track and field competitions within its own territory and has agreed with all other federations to follow IAAF rules in doing so. The national

place when . . . a prohibited substance is found to be present within an athlete's body tissue or fluids. . . ." IAAF Rule 55(2)(i) (App. E at 94a) (Emphasis added). In the prosecution of a doping charge under this rule, "the IAAF or the member (as the case may be) shall have the burden of proving, beyond a reasonable doubt, that a doping offence has been committed." IAAF Rule 59(5) (App. E at 98a) (Emphasis added). But in the case of an alleged doping offense involving exogenous testosterone, as the Court of Appeals noted, the IAAF cannot meet this burden because testosterone is a substance appearing naturally in the human body (endogenous testosterone). Because of this, the IAAF has adopted a special rule that simply eliminates all together its burden under IAAF Rule 59. This special rule establishes an indirect "test" for the "detection" of exogenous testosterone that relies upon the ratio of testosterone to epitestosterone (T/E) in an athlete's urine sample.[6] Under this rule, if the T/E ratio

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federation in the United States in USA Track and Field, Inc.

The IAAF concedes that "athletes are members of their own national federations, not of [the] IAAF." Memorandum in Support of Defendant IAAF's Motion to Dismiss the Complaint at 21, citing the Affidavit of Mark Gay, ¶¶10, 41. Athletes such as Petitioner pay no dues to the IAAF. Id. ¶10. The IAAF's control of athletes, therefore, is indirect, through its control of the national federations of which the athletes are members. As a result, it is only through the rules and regulations of USATF that Petitioner and other American athletes are subject to the rules of the IAAF, but only to the extent such rules and regulations have been adopted by USATF. See, USATF Regulation 6 (B). There is nothing in the rules or regulations of USATF that subjects American athletes to IAAF Rule 21.

[6] Testosterone often is referred to as a male hormone, but it is present in the bodies of both men and women. Complaint ¶21. Epitestosterone is also a hormone that appears in the human

exceeds 6:1, it will be deemed positive for exogenous testosterone.[7] In that event, the athlete is guilty of a doping offense (*i. e.*, exogenous testosterone is presumed to be present in the urine sample) unless she "proves by clear and convincing evidence that the abnormal ratio . . . is attributable to a pathological or physiological condition."[8] Although the Court of Appeals called this T/E ratio rule a "rebuttable presumption" (App. A at), in fact, as Respondents know, the presumption is scientifically impossible to rebut.

The reason Respondents cannot prove the presence of exogenous testosterone in an athlete's urine using the T/E ratio test, however, is because it is impossible to identify what causes the T/E ratio to be elevated. If Respondents were able to do so, they could prove when an elevated T/E ratio is due to exogenous testosterone. Instead, all they can do is show that the T/E ratio is elevated, and identify factors, including exogenous testosterone, that might have caused the elevation. But they cannot show when in fact an elevated T/E ratio is due to a particular factor, and, of course, neither can Petitioner, or any other athlete. This is a special problem for women who compete in international athletics because their hormone levels, including testosterone and epitestosterone

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body. It has no known function, but appear to exist in some relationship to testosterone, the precise nature of which is not known. Id. at ¶23

[7] Schedule 1, IAAF Procedural Guidelines for Doping Control. App. E at 98a.

[8] Id.

naturally fluctuate, at times above the 6:1 threshold level established by Respondents.[9]

Consequently, Respondents' continued use of the T/E ratio allegedly to detect the presence of exogenous testosterone in the urine samples of female athletes is a sham, designed to protect their commercial interests by convincing the public that they are tough on drugs, at the expense of innocent athletes, such as Petitioner.[10] The T/E ratio rule

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[9] As a result of studies conducted by Olympic laboratories with which Respondents are affiliated, Respondents are aware that several non-doping factors may cause a female athlete's T/E ratio to increase, including bacterial contamination of her urine sample; her mensural cycle; alcohol; her age; and birth control pills. For example, in one study, officials found that the T/E ratios of two of the four female subjects fluctuated widely over the course of their mensural cycles. Indeed, the T/E ratio of one of the women about Petitioner's age fluctuated between 1.7:1 and 12.6:1 in a single day. The scientists could not explain why these fluctuations occurred, and did not try. Contrary to the erroneous suggestion of the Court of Appeals (App. A at ____a), however, the Olympic laboratories have never adjusted their use of the T/E ratio to account for these findings; instead, they simply ignored them.

[10] The Court of Appeals touches upon this motive in its opinion:

> Because of indications, during the late 1970's, that some national track and field federations were turning blind eyes to their athletes' drug abuse, the IAAF established worldwide testing procedures and eligibility rules. Rules 21-23 require all disputes between the IAAF and members to be submitted to an arbitration panel.

completely eliminates the requirement in IAAF Rule 55 that the IAAF prove the presence of a prohibited substance in the athlete's urine. Instead, it makes an elevated T/E ratio alone the doping offense, while misleading the public into believing that the athlete therefore has cheated.[11]

The T/E ratio test rests upon a irreparably flawed hypothesis, the invalidity of which was apparent from its inception. The hypothesis assumed, based almost exclusively upon uncontrolled studies of male urine samples, that the T/E ratio in humans ordinarily is one-to-one; that the ratio is naturally stable at that level; and that the use of exogenous testosterone increases a person's T/E ratio. Based on those

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App. A at 6a, n5.

[11] The news media reported that Petitioner "was being investigated for high levels of the male sex hormone testosterone detected in her urine sample last June [1996]. "Track and Field", The Washington Post, May 15, 1997, at page C-2; *see also*, "Drug Inquiry Drags for Angered Slaney", The New York Times, May 15, 1997, at Section B, p. 17; "Report Says Slaney Failed Drug Test", The Toronto Star, May 15, 1997, at D-32. The sole basis for the doping charges against Petitioner was her elevated T/E ratio, not an elevated level of testosterone. In fact, Petitioner's testosterone level, including in the disputed urine sample, was well within the normal range for women. Complaint ¶ 37. Thus, her elevated T/E ratio apparently was due to a decrease in the level of her epitestosterone level. The IAAF's own expert acknowledged this possibility: "[i]f Petitioner changed birth control medication as suggested in her [July 15, 1996] Declaration, it is conceivable that it could have resulted in a suppression of [her] epitestosterone concentration [and, therefore, an increase of her T/E ratio]. The percentage change [in her case] is consistent with the suppression observed in the non-peer reviewed study mentioned above." Complaint ¶¶ 91 - 92.

untested assumptions, the international sports officials who developed the test concluded that a urine sample with a T/E ratio above 1:1 invariably would be the product of a doping offense. However, because this hypothesis could not be confirmed scientifically, they set the prohibited level at 6:1, which they simply assumed was high enough to exclude the possibility of a false positive.[12] These officials discovered immediately that their conclusion was unfounded. Complaint ¶¶ 23-31.

Shortly after introduction of the T/E ratio test in 1984, Olympic officials unexpectedly discovered that some individuals appeared naturally to have T/E ratios systematically elevated above 6:1. Id. ¶ 26. That fact had not been presaged by any of the thousands of urine samples analyzed prior to 1984. Id. Rather than discard the test, however, these officials tried to adjust it to account for their new discovery; they also began a desperate and, as the Court of Appeals notes, so far unsuccessful effort to find a direct test for exogenous testosterone. The head of the UCLA Olympic Laboratory, who assisted in the development of the test, was quoted in 1994 as calling the unavailability of a scientifically valid test for exogenous testosterone "an analytical emergency in its 10th year."[13]

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[12] The Court of Appeals said that the trigger point was set at 6:1 "to account for non-doping factors that might elevate ratios in female athletes." (App. A at 3a). That is incorrect. As noted, the level was set at 6:1 because the laboratory officials who developed the test thought that was high enough to preclude a false negative. *There never has been any adjustment of the test to account for factors known temporarily to elevate the T/E ratios of female athletes.*

[13] "Drug expert calls for 'fingerprint' control," *The Daily Telegraph*, September 20, 1994, at 35.

In an effort to mask the inherent fallibility of the T/E ratio test for detecting exogenous testosterone, international sports officials, including Respondents, first changed their rules to provide that a T/E ratio above 6:1 only "suspicious;" at the same time, they also mandated an investigation that was suppose to rule out innocent factors that might have caused the suspicious ratio. Later, fearing that the 6:1 ratio did not fully account for all natural fluctuations they had witnessed, these officials increased the level of a suspicious ratio to 10:1.[14] Subsequently, however, fearing they had overcompensated, they returned the suspicious level to its present 6:1 ratio, and retained the requirement of a mandatory investigation. Id. at ¶ 27.

The mandatory investigation required in a testosterone case must be conducted "before a sample [with a T/E ratio greater than 6:1] can be called positive." Specifically,

> The presence of a testosterone (T) to epitestosterone (E) ratio greater than six (6) to one (1) in the urine of a competitor constitutes

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[14] Some Olympic federations retain the ratio at 10:1. In a recent report commission by the U. S. Office of National Drug Control Policy, for example, the authors note that "there may be subtle differences in how certain substances may be treated in terms of cut-off levels (e. g., testosterone to epitestosterone ratios are allowable up to a level of 6:1 under IOC regulations, but can reach as high as 10:1 before being considered a doping infraction under International Tennis Federation rules). . . . "Winning at any cost: Doping in Olympic Sports" A Report by the CASA National Commission on Sports and Substance Abuse at 47 (September 2000). This demonstrates the lack of merit to the USOC's claim that there is nothing it could do about the flawed test. If the cut-off in this country had been 10:1, Petitioner's initial test result of 9.5:1 would not have been reported as suspicious.

> an offense unless there is evidence that this ratio is due to a physiological or pathological condition. . . .
>
> In the case of T/E higher than six (6), it is mandatory that relevant medical authority conduct an investigation before the sample is declared positive. A full report will be written and will include a review of previous, subsequent tests and any results of endocrine investigations. . . . The results of these investigations should be included in the report. . . .

Chapter II, Article I, Section C of the International Olympic Committee Medical Code, Complaint ¶ 28. The express purpose of this mandatory investigation is "the prevention of false positive results." Id. In fact, however, Respondents routinely conduct the investigation only to eliminate the possibility that the athlete's T/E ratio is systematically elevated, despite their knowledge that non-doping factors could temporarily cause a female athlete's T/E ratio to increase. Indeed, they make no effort whatever to exclude that as a possibility for a false positive.

In the course of the proceedings against her, Petitioner discovered, contrary to Respondents' rules and their explicit representations to her and others, that no investigation of any kind was done to determine whether her elevated T/E ratio was due to a pathological or physiological condition.[15]

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[15] After she was notified that her T/E ratio was suspicious, Petitioner provided an "explanation," at the request of the IAAF. The purpose of the explanation was to identify any factor that might explain the elevated ratio, other than doping. In her explanation, Petitioner, based on the preliminary research that

Moreover, more than a year after accusing Petitioner of cheating, the IAAF's own experts began to acknowledge expressly the impossibility of isolating the factors that may have caused Petitioner's T/E ratio to increase. For example, one expert in Petitioner's case advised the IAAF that, "[Petitioner's] case will be difficult simply because it lies in an area with little hard scientific data." Furthermore, he wrote, "[t]here is not sufficient data in the documentation to refute beyond a reasonable doubt the possibility that [Petitioner's] elevated T/E ratio is due to . . . birth control pills." Complaint ¶91; *see also,* Id. at ¶¶ 88 - 90. Although conceding reasonable doubt about what caused Petitioner's elevated T/E ratio, the expert nevertheless recommended that the IAAF pursue its case against Petitioner out of fear that if Petitioner prevailed on that basis, he would be "concerned about the ability to pursue any T/E case in women. . . . This in and of itself may be reason for the IAAF to pursue some course of action."[16] Id. at ¶ 92.

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she was able to do, suggested that her elevated ratio plausibly could be due to her abnormal mensural cycle, or her recent use of "progesterone" based birth control pills. Her affidavit was supported by the affidavit of an analytical chemist, and by medical records from 1996. Complaint ¶ 48. Subsequently, Petitioner added the affidavit of a distinguished endocrinologist. Id. ¶ 64. In its alleged investigation in 1996, the IAAF ignored this "evidence that [the elevated] ratio is due to a physiological or pathological condition," contrary to the protocol for the mandatory investigation. Id. ¶ 28.

[16] The Court of Appeals, after noting the impossibility of proving the presence of exogenous testosterone in a urine sample, suggests that if Respondents were not permitted "to make use of the rebuttable presumption [i. e., shift the burden of proof to the athlete with the elevated T/E ratio], it would be nearly impossible, absent eyewitness proof, to ever find that an athlete has

On September 17, 1997, after a hearing before a USATF hearing panel, USATF exonerated Petitioner. Comp. ¶¶ 77- 80. In its opinion, the hearing panel agreed with Petitioner that the IAAF had failed to prove beyond a reasonable doubt that exogenous testosterone was present in her urine sample, as required by IAAF rules. The panel held that an elevated T/E ratio was not a valid means of detecting exogenous testosterone in a female athlete's urine sample, and thus was not proof of Petitioner's "guilt beyond a reasonable doubt."

Under its rules, the IAAF had the right to seek in-house arbitration of the USATF decision.[17] IAAF Rule 21(3).

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ingested testosterone." App. A at 21a. The court defends shifting the burden this way by noting that criminal defendants "are frequently required to come forward with proof establishing a basis for asserting affirmative defenses." Id. The court ignores one important difference: affirmative defenses assume that the state has proved beyond a reasonable doubt each element of the criminal offense. Here, as the IAAF successfully argued in its arbitration proceedings, "it [was] under no burden to prove the use of any particular substance, nor to prove that an elevated T/E ratio was caused by a prohibited substance." Complaint ¶101. In other words, the presence of exogenous testosterone was presumed solely from the elevated T/E ratio. And, because it is impossible scientifically to prove what caused a particular elevated T/E ratio, the presumption is irrebuttable. In criminal law, such an irrebuttable presumption could not be used even to mandate the finding of a material element of a criminal offense. *Francis v. Franklin*, 471 U. S. 307 (1985); *Sandstrom v. Montana*, 442 U. S. 523 (1979). Here, it is used to mandate conviction.

[17] IAAF Rule 21(3) permits the IAAF to challenge the decision of a member national governing body such as USATF when the "Member has held a hearing under IAAF Rule 59, and

In that proceeding, which took place in Monte Carlo, Monaco, the IAAF and USATF were the only parties.[18] Petitioner participated in the proceeding voluntarily, to

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the IAAF believes that in the conduct or conclusions of such hearing the Member has misdirected itself, or otherwise reached an erroneous conclusion." IAAF Rule 21(3)(ii). An arbitration under Rule 21(3)(ii) is concerned only with the decision of an IAAF member, arising out of a hearing conducted in a doping case under IAAF Rule 59. In Petitioner's case, USATF exonerated her, following a hearing under Rule 59. The IAAF subsequently challenged that decision. Both the IAAF's referral of the dispute to arbitration and the IAAF Arbitration Panel's decision are explicit that this arbitration was between the IAAF, as Applicant, and USATF, as Respondent. *See*, App. C at 69a; IAAF Notice of Referral and Statement of IAAF in Support of Its Reference to Arbitration, Affidavit of Mark Gay, , Ex. 10, Attached to Memorandum in Support of Defendant's Motion to Dismiss the Complaint.

Arbitration under IAAF rules is entirely in-house. The arbitrators are selected by the IAAF, and serve at its pleasure. As this case demonstrates, the arbitrators are bound by the IAAF's own interpretation of its rules, and in that sense are not independent.

[18] The caption of the USATF Arbitration makes clear that the proceedings were under IAAF Rule 21(3)(ii), and not Rule 21(2): In the Matter of an Arbitration Initiated by the International Amateur Athletic Federation "IAAF" Applicant under IAAF Rule 21 para 3 (ii) in a case Where a Member of the IAAF, USA Track & Field INC. "USATF", Respondent, Has Held a Hearing Under IAAF Rule 59 "Disciplinary Procedures For Doping Offences" and the IAAF Believes That in the Conduct Or Conclusions of Such Hearing USATF Has Misdirected Itself or Otherwise Reached an Erroneous Conclusion., App. C at 69a.

support USATF's defense of its decision[19]. Petitioner did not assert any claims against the IAAF in that proceeding, nor, as the Court of Appeals appears to agree, was Petitioner required by any written agreement between her and the IAAF to assert her claims against the IAAF. In that arbitration, the IAAF took the position that "it [was] under no burden to prove the use of any particular substance, nor to prove that an elevated T/E ratio was caused by a prohibited substance."[20] Complaint ¶101. Rather, it argued that once it proved that Petitioner's T/E ratio exceeded 6:1, the burden shifted to Petitioner to prove by clear and convincing that a specific innocent factor had caused the elevation.

During her participation in the IAAF arbitration, Petitioner joined USATF in challenging the IAAF's interpretation of its burden under IAAF Rule 59, and in arguing that an elevated T/E ratio did not prove the presence of exogenous testosterone in Petitioner's urine sample.[21] The

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[19] Petitioner's decision to participate in the proceeding was a practical one. In the USATF hearing, USATF prosecuted the case against Petitioner. Thus, the case upon which the USATF hearing panel decided in Petitioner's favor was presented by Petitioner. If Petitioner had not assisted USATF in the IAAF proceedings, it would have been substantially more difficult for USATF to defend the decision.

[20] The IAAF's position was in response to its expert's testimony at the USATF hearing that she could not identify the prohibited substance that allegedly caused Petitioner's elevated T/E ratio. Instead, her position was that a precursor to testosterone, and not exogenous testosterone as she previously had claimed, likely was responsible.

[21] The IAAF's counsel conceded during the arbitration hearing that if the IAAF had to prove that a prohibited substance in

IAAF panel expressly ruled, however, that it was bound by the IAAF's own construction of its rules, and thus the IAAF's statement of its burden of proof would govern. As a result, the burden of proof was not an issue in dispute. And, consequently, neither was the validity of the T/E ratio an issue.[22] In an interlocutory decision, the Panel adopted the IAAF's position on burden of proof: to prevail, the IAAF had to prove only that Petitioner's T/E ratio exceeded 6:1, and that a T/E ratio greater than 6:1 generally was not normal. Id. at ¶ 104; App. C at 69a. At that point, Petitioner would be presumed guilty of a doping offense, unless she could prove by clear and convincing evidence that her elevated T/E ratio was due to an innocent factor. As a result of that ruling, Petitioner terminated her voluntary participation in the proceedings. And since USATF also could not prove what had caused Petitioner's elevated T/E ratio, it too made no

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fact had caused Petitioner's elevated T/E ratio, it could not do so. Complaint ¶ 104. Indeed, as noted, the IAAF's expert already had advised that "[t]here is not sufficient data in the documentation to refute beyond a reasonable doubt the possibility that the elevated T/E ratio is due to . . . birth control pills." However, the panel's ruling eliminated reasonable doubt as a defense to a doping charge involving exogenous testosterone.

[22] In its opinion, the IAAF panel discusses evidence that Petitioner had introduced in the USATF proceeding relating to studies of factors affecting a woman's T/E ratio; however, the panel discusses the studies only in the context of whether they prove by clear and convincing evidence what had caused Petitioner's elevated T/E ratio. Because such proof is scientifically impossible, Petitioner and USATF made no attempt to meet the burden. Petitioner offered the studies in the USATF proceeding, not to prove what had caused her elevated T/E ratio, but to show there was reasonable doubt about whether it was due to exogenous testosterone.

further appearance in the proceedings. The panel subsequently made an award in favor of the IAAF and against USATF. App. C at 69a. The panel's award was not made against Petitioner personally, nor did it purport to decide any claim she had against the IAAF concerning the unlawful and tortious use of the T/E ratio.

On April 12, 1999, Petitioner filed this action in the United States District Court for the Southern District of Indiana, Indianapolis Division, raising numerous contract and tort claims under sate law. The district court dismissed Petitioner's claims against the IAAF on the ground that IAAF rules required her to submit those claims to binding arbitration, and, as a result, Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") deprived the court of subject matter jurisdiction.[23] The district court dismissed the state law claims against the USOC on the ground that the Amateur Sports Act[24] preempts all claims relating in any way to the USOC's drug testing program.

Although the IAAF also moved to dismiss the complaint on the ground that the district court did not have personal jurisdiction, the district court felt "personal jurisdiction would be proper in this case." App. B at 60a.

On appeal, the Court of Appeals affirmed. The panel held that Petitioner's state law claims against the IAAF were

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[23] App. D at 89a.

[24] 36 U.S.C. §220501 et. seq. The Amateur Sports Act was reenacted and amended in 1998, and renamed the "Ted Stevens Olympic and Amateur Sports Act." Petitioner will continue to refer to the Act as The Amateur Sports Act.

barred, not by Article II of the New York Convention,[25] but by Article V, which permitted the IAAF to interpose the IAAF panel's award as a defense to Petitioner's claims. App. D at 15a-16a. The panel held that Petitioner's state law claims against the USOC were barred as a result of the USOC's exclusive jurisdiction under the Amateur Sports Act to determine the eligibility of athletes to compete in Olympic sports.

The Court of Appeals's decision with respect to Petitioner's claims against both Respondents rests upon its fundamentally erroneous conclusion that a challenge to the manner in which Respondents make an eligibility is a challenge to the eligibility determination itself.

REASONS FOR GRANTING THE WRIT

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THE ISSUES ARE IMPORTANT FEDERAL QUESTIONS THAT HAVE NOT, BUT SHOULD BE, SETTLED BY THIS COURT

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[25] In the district court, Petitioner argued that there was no written agreement that required her to arbitrate her claims against the IAAF, and thus Article II of the New York *Convention did not apply. Kahn Lucas Lancaster. Inc. v. Lake International LTD.*, 186 F. 3d 210 (2d Cir. 1999). The district court rejected that argument, but the Court of Appeals apparently found it convincing, noting that if the IAAF had sought to compel Petitioner to arbitrate her claims, "determination as to whether there had been a writing might pose a barrier to the IAAF's position." App. A at 15a.

A. Question One is Important Because It's Resolution Will Determine The Extent to Which American Athletes In the Future Will Participate Voluntarily in the Arbitration of Olympic sports disputes.

The Court of Appeals held that because she voluntarily participated in the arbitration proceedings between the IAAF and USATF, Petitioner is barred by Article V of the New York Convention from litigating her state law claims against the IAAF. App. A at 21a. That decision is a fundamental misapplication of federal arbitration law, and, if not reversed, will frustrate, rather than promote the purpose of the New York Convention.[26]

The first mistake in the Court of Appeals analysis is its conclusion that by participating in the IAAF/USATF arbitration, Petitioner voluntarily submitted her state law claims to arbitration, and that the IAAF arbitration panel decided those claims against Petitioner when it declared her ineligible to compete. A review of the IAAF arbitration panel's award makes clear that both conclusions are wrong. App. C at 69a. Petitioner's state claw claims are not an attempt to relitigate her eligibility to compete under IAAF

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[26] Federal policy strongly favors arbitration of both national and international disputes. But arbitration is a "dispute resolution mechanism which is not imposed absent both parties' consent." *Recold v. Monfort of Colorado, Inc.*, 893 F. 2d 195, 197 (8th Cir. 1990) (citations omitted). At bottom, while the federal policy favoring arbitration is one "guaranteeing enforcement of commercial arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 625 (1985), it "does not create[] such agreements where none exists." *Recold v. Monfort of Colorado, Inc.*, *supra*, 893 F. 2d 195, 197.

rules. Rather she seeks to recover for harm she suffered as a result of the unlawful manner in which the IAAF determined her eligibility, and to enjoin its continuing unlawful conduct. That distinction is one that the Court of Appeals itself recognized in its decision in favor of the USOC:

> In *Harding v. United States Figure Skating Ass'n,* 851 F.Supp. 1476, 1479 (D.Or.1994) *vacated on other grounds*, 879 F.Supp. 1053 (D.Or.1995), the court defined (we believe correctly) the limited role that federal courts should play in eligibility determinations. There, the court cautioned that "courts should rightly hesitate before intervening in disciplinary hearings held by private associations. . . . Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies." Yet, while carving out this limited exception to the preemption created by the Amateur Sports Act, the opinion forewarned that while examining whether internal rules had been complied with, the courts "should not intervene in the merits of the underlying dispute." Id.

App. A at 25a. In trying to distinguish *Harding* from this case, the Court of Appeals ignores that the underlying claim in *Harding* was based upon her rights under state law.

If federal courts can intervene under state law *directly* into an eligibility dispute *prior* to a determination of eligibility to prevent irreparable harm that would result from the manner in which the federation is implementing its rules, then surely

they can entertain the same state law claim *after* the determination of eligibility to remedy harm actually caused by the unlawful manner in which the rules were implemented. Indeed, this Court itself has intervened directly into an eligibility dispute to preserve an athlete's rights under state law. *Reynolds v. International Amateur Athletic Federation*, 505 U. S. 1301 (1992) (order by Stevens, J., granting stay to permit athlete to compete in 1992 Olympic Trials) ("pecuniary award [under state law] is not an adequate substitute for the intangible values for which the world's greatest athletes compete.").[27] Thus, the fact that sports federation's unlawful conduct occurs in the context of an eligibility determination does inherently make the resulting state law claim one about eligibility. The logic of the Court of Appeals' decision would bar the type of intervention made by this Court in *Reynolds*. Decisions such as *Reynolds* and *Harding* cannot co-exist with the decision of the Court of Appeals.[28]

The second fundamental flaw in the Court of Appeals' decision follows from this first error: its erroneous conclusion that the IAAF arbitration panel's determination that Petitioner was ineligible implicates Article V of the New York Convention, which bars litigation of claims that are resolved

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[27] The *Reynolds* case subsequently was dismissed for lack of personal jurisdiction. *Reynolds v. International Amateur Athletic Federation*, 23 F. 3d 1110 (6th Cir.), cert. denied, 513 U. S. 962 (1994).

[28] As Petitioner points out in the discussion of the decision on Petitioner's claims against the USOC, infra, Congress, which granted the USOC exclusive jurisdiction to determine eligibility disputes, also recognized the distinction between a challenge to eligibility and a challenge to the manner in which eligibility was being determined. 36 U.S.C. § 220509.

by an arbitration award. The court's own analysis makes clear this error. Petitioner did not raise her state law claims in the IAAF arbitration, and the arbitration panel did not address or decide those claims. *Cf., Lindland v. U. S. A. Wrestling Ass'n, Inc.*, 200 U. S. App. LEXIS 21754, *9-10 (7th Cir. 2000). ("[t]he USOC's argument that [an Olympic wrestler] has failed to 'exhaust his remedies' because he is participating in the arbitration initiated by [another athlete] is frivolous."). In fact, by accepting the IAAF's position that "it [was] under no burden to prove the use of any particular substance, nor to prove that an elevated T/E ratio was caused by a prohibited substance," the IAAF arbitration panel expressly held that the issues underlying Petitioner's claims (including that the T/E ratio rule was scientifically invalid as a means of detecting exogenous testosterone, and that shifting the burden of persuasion to Petitioner to prove her innocence) were irrelevant to her eligibility under IAAF rules. Thus, since there is no arbitration award deciding Petitioner's state law claims, unless Petitioner was required by written agreement to submit those claims to arbitration under Article II of the New York Convention, *Kahn Lucas Lancaster, Inc. v. Lake Int'l Ltd.*, 186 F. 3d 210 (2d Cir. 1999), which the Court of Appeals acknowledged was unlikely, the New York Convention is irrelevant to this case.

Finally, the decision of the Court of Appeals, if permitted to stand, will undermine the very purpose of the New York Convention, and federal arbitration law generally, to encourage the voluntary arbitration of disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 625 (1985). As the Court of Appeal held, and contrary to the district court's conclusion, Petitioner voluntarily participated in the IAAF arbitration to facilitate resolution of the dispute between USATF and the IAAF; she was not required to do so by IAAF rules. The Court of Appeals suggests that if Petitioner had not participated in that proceeding, her state law claims would have been preserved.

The consequence of that ruling, if it stands, will be to discourage American athletes from participating voluntarily in international Olympic arbitrations, for fear of forfeiting state law claims they may have against the sponsoring federation. That is especially true in the case of arbitration between USATF and the IAAF under the IAAF Rule 21(3), since the Southern District of Indiana may be the only federal court in which personal jurisdiction over the IAAF is available.[29] The decision of the Court of Appeals thus will have a chilling effect on the arbitration of international sports disputes involving American athletes. It will discourage the arbitration of claims that appropriately could be arbitrated, and will undermine the arbitration of disputes, such as those under IAAF Rule 21(3)(ii), that must be arbitrated.[30] *Compare Lindland v. U. S. A. Wrestling Ass'n, Inc.*, 200 U. S. App. LEXIS 21754 (7th Cir. 2000).

The Court should grant a writ of certiorari in this case in order to resolve these important issues of federal arbitration law, and to make clear that international sports federations that literally control the careers of American athletes who

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[29] *See, Reynolds v. International Amateur Athletic Federation*, 23 F. 3d 1110 (6th Cir.), cert. denied, 513 U. S. 962 (1994).

[30] As previously noted, this is especially significant for USATF because by definition, when its decision is challenged by the IAAFunder IAAF Rule 21(3), it means that USATF and the athlete were on the opposite sides of the dispute before the USATF hearing panel. In the case where the hearing panel decides in favor of the athlete, the decision that USATF will have to defend will be one based on the athlete's case. The athlete obviously has an incentive to assist USATF to defend that decision, but it is unlikely that most athletes will do so at the cost of forfeiting their claims against the IAAF.

compete in international competition are not immune from liability for the unlawful or tortious manner in which they implement their rules.[31]

B. Question Two is Important Because It Will Determine Whether the United States Olympic Committee Is Accountable In Any Way To American Athletes For The Tortious and Unlawful Manner in Which it Conducts its Activities Under the Amateur Sports Act.

Petitioner's state law claims against the USOC are predicated upon the USOC's own activities in collecting, transporting and analyzing Petitioner's urine sample, and improperly supervising the investigation of Petitioner's elevated T/E ratio. Its decision to request the UCLA Olympic laboratory to analyze her June 17, 1996, urine sample for its T/E ratio, fully knowing that the T/E ratio test was flawed and that it discriminated against female athletes, set in motion all of the subsequent events that caused Petitioner harm.[32]

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[31] This Court previously has deal with the IAAF's arbitrary conduct in an eligibility dispute. At that time, Justice Stevens wrote, "The IAAF's threat to enforce its eligibility decision – no matter how arbitrary or erroneous it may be -- by punishing innocence third parties cannot be permitted to influence a fair and impartial adjudication of [the athlete's] claims." *Reynolds v. IAAF*, 505 U. S. 1301 (1992).

[32] The fact that the USOC knew of the inherent flaws in the T/E ratio test is clear. The Executive Director of the USOC acknowledged this fact after the unauthorized public disclosure that Petitioner was being investigated for a doping violation. Complaint ¶ 31. That knowledge also motivated the effort of the USOC's general counsel to obstruct Petitioner's challenge to the T/E test by

Moreover, the USOC does not have any administrative process pursuant to which Petitioner could pursue her claims against the USOC for its own unlawful and tortious conduct. Thus, if the decision of the Court of Appeals stands, neither Petitioner nor any other American athlete will have *any* recourse for the tortious or unlawful harm caused by the USOC in the conduct of its exclusive activities under the Amateur Sports Act.[33] This Court should grant a writ of certiorari to determine if, as a result of the USOC's exclusive jurisdiction to determine the eligibility of American athletes to compete in Olympic sports, athletes rights against the USOC under state law are abrogated. The resolution of that question will affect every American athlete who participates

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instructing the UCLA laboratory "not to provide any further analytical information on [Petitioner's] case." Id. at ¶ 69.

In the proceedings below, the USOC repeatedly argued that it was powerless to prevent any of the harm that Petitioner claims she suffered. That, however, is a question for the jury to determine, and is inappropriate to decide on a motion to dismiss. In any event, however, the USOC's claim of powerlessness is not true. For example, the USOC could have raised the trigger for a suspicious T/E ratio from 6:1 to 10:1 to account for the known effect of innocent factors on a female athlete's T/E ratio, as some federations have done. *See, note 14, supra.* If the USOC had done that, Petitioner's initial T/E ratio of 9.5:1 would not have been "suspicious," and none of the harm that she has suffered in this case would have occurred.

[33] In response to this point, the USOC has suggested that Petitioner's recourse would be against USATF, the national governing body for track and field, under the administrative process established by the USOC to review USATF's eligibility decisions. That administrative process, however, is not available for a claim against the USOC itself, and therefore is irrelevant.

in international amateur athletics, including the Olympics and the Para Olympics.

The decision of the Court of Appeals ignores well-established principles of federal law reflected in the decisions of this Court. It holds that because Congress gave the USOC exclusive jurisdiction to determine the eligibility of athletes to participate in Olympic competition, it automatically follows that Congress intended to abrogate all rights those athletes had under state law for the tortious or unlawful manner in which such determinations are made. That conclusion is fundamentally wrong. This Court has held that, "[i]n order to abrogate a common-law principle [such as negligence] the statute must speak directly to the question addressed by the common law." *U. S. v. Best Foods*, 524 U. S. 51, 63 (1998). And, where there is no private right of action under a federal statute, common law remedies are precluded only when the statute preempts them, either expressly or impliedly; courts are especially reluctant to infer preemption where, as here, the result would be that an aggrieved party is left without any remedy at all. *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238 (1984); *Symens v. Smithkline Beecham Corp.*, 152 F. 3d 1050 (8th Cir. 1998). As the Court said in *Silkwood*, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U. S. at 251.

In this case, the Amateur Sports Act has been interpreted to provide no "private right of action" based upon the exclusive duty it imposes upon the USOC to protect the rights of American athletes to compete in international competition and to ensure that eligibility determinations are made in a fair and nondiscriminatory manner.[34] 36 U.S.C. §§

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[34] The fact that the Amateur Sports Act does not provide a private right of action does not preclude a federal court from

220503(8), 220505(c)(5), 220509(a), 220522(a)(4)(B); *Martinez v. USOC*, 802 F.2d 1275, 1280 (10th Cir.1986); *Michels v. United States Olympic Committee*, 741 F.2d 155, 156 (7th Cir.1984); *Oldfield v. Athletic Congress*, 779 F.2d 505, 507 (9th Cir.1985); *DeFrantz v. United States Olympic Committee*, 492 F.Supp. 1181, 1191 (D.D.C.1980). At the same time, the Act is silent about any abrogation of athletes' rights under state common law. But, to infer such an abrogation would leave American athletes without any remedy whatever against the acts of the USOC, no matter how egregious, arbitrary, or intentional they might be. This is fundamentally inconsistent with well-established doctrine that precludes such implied preemption in such a circumstance. Rather, an inference of preemption is appropriate only where

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borrowing duties from the statute in enforcing Petitioner's state law claims against the USOC. *Hafbauer v. Northwestern Nat'l Bank of Rochester*, 700 F. 2d 1197 (8th Cir. 1983) ("even though the [plaintiffs] cannot assert a private cause of action under federal law, the federal statutes may create a standard of conduct which, if broken, would give rise to an action for common law negligence. That is a question of [state] law best left to the courts of that State."); *Molinari v. Royal Heights Construction Co.*, 1998 WL 1181667, *4 (Mass. Super. 1998)("Where a statutory right is conferred upon a class of individuals as distinguished from the public at large but no remedy is provided by statute for enforcement of the right, the right may be asserted by any appropriate common law remedy that is available."). This conclusion is implicit in the cases discussed above. *Reynolds v. International Amateur Athletic Federation*, 505 U. S. 1301 (1992); *Harding v. United States Figure Skating Ass'n*, 851 F.Supp. 1476, 1479 (D.Or.1994) *vacated on other grounds*, 879 F.Supp. 1053 (D.Or.1995). Thus, the fact that Petitioner and other Olympic athletes may base their state law claims in part upon the the statutory obligation of the USOC to make eligibility determinations fairly is consistent with this principle of common law.

enforcement of state law remedies "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Brown v. Kerr-McGee Chemical Corp.*, 767 F 2d 1234, 1240 (7th Cir. 1985), cert. denied, 475 U. S. 1066 (1986). No such conflict exists here.

First, as the Court of Appeals notes with approval, federal courts already have intervened *directly* into eligibility disputes to protect the state law rights of Olympic athletes seeking injunctions to prevent the irreparable harm that would result from the unlawful manner in which the USOC and its members make eligibility determinations. *Reynolds v. International Amateur Athletic Federation*, 505 U. S. 1301 (1992); *Harding v. United States Figure Skating Ass'n,* 851 F.Supp. 1476, 1479 (D.Or.1994) *vacated on other grounds*, 879 F.Supp. 1053 (D.Or.1995). The Court of Appeals attempts to distinguish these cases by suggesting that they are limited to situations in which intervention is necessary to make sure the federations comply with their internal rules when making eligibility determinations. App. A at 24a-25a. That distinction, however, ignores that the only basis for the authority of those courts to issue an injunction was the athlete's rights under state law.

If a court can intervene directly into an eligibility determination under state law to prevent harm to the athlete that would result from the manner in which an eligibility determination is being made, then *a fortiori*, it can entertain such claims after the eligibility determination has been made in an unlawful or tortious manner and to prevent the further harm that would result from a continuation of the unlawful conduct. In both cases, the state law remedies are directed at the unlawful or tortious manner in which the eligibility determinations are made, not at the determinations

themselves. *Reynolds v. International Amateur Athletic Federation,* supra.[35]

Second, and perhaps most importantly, Congress itself has recognized the availability of state law remedies to challenge the manner in which eligibility determinations are made. After the Tonya Harding incident that was the basis for the decision in *Harding v. United States Figure Skating Ass'n, supra*, Congress amended the Amateur Sports Act to restrict only the time period in which a court may enjoin in an eligibility determination in advance of the selection of athletes to participate in the Olympic Games, and certain other international athletic events.[36] 36 U.S.C. § 220509(a). Thus, "in any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games . . . a court may not grant injunctive relief against the [USOC] within 21 days before the beginning of such games if the [USOC] . . . has provided a sworn statement . . . to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games." *Id.* Under the decision of the

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[35] The *Reynolds* case subsequently was dismissed for lack of personal jurisdiction. *Reynolds v. International Amateur Athletic Federation*, 23 F. 3d 1110 (6th Cir.), cert. denied, 513 U. S. 962 (1994).

[36] This provision was part of the 1998 Omnibus Consolidated Appropriations Act, P. L. 105-277, 112 Stat. 2681-605 (1998). According to the Chairman of the Senate Appropriations Committee, who sponsored the amendment, the purpose of this provision was to make sure that the USOC could select a team for the Olympics if a state law dispute affecting eligibility could not be resolved in time for the USOC to decide the athlete's eligibility to compete before the Games are to begin. 144 Cong. Rec. S12741, S12777 (October 21, 1998).

Court of Appeals, this provision would have been unnecessary. That decision then obviously flies in the face of Congress's own interpretation of the Amateur Sports Act.

Finally, Petitioner's claims are not in any way inconsistent with the USOC's obligations under the Amateur Sports Act. To the contrary, they are fully consistent with the Act. Thus, for example, the Act requires the USOC to "protect the opportunity of any amateur athlete . . . to participate in amateur athletic competition," 36 U.S.C. § 220503(8); "to encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety," 36 U.S.C. § 220503(11); and, "to encourage and provide assistance to amateur athletic activities for women," 36 U.S.C. § 220503(12). Petitioner's claims also are consistent with the obligation of a national governing body under the Act, which the USOC must enforce, to "provide[] an equal opportunity to amateur athletes . . . to participate in amateur athletic competition, without discrimination on the basis of . . . sex, [or] age . . . and with fair . . . opportunity for a hearing to any amateur athlete . . . before declaring the individual ineligible to participate." 36 U.S.C. § 220522(8). All of those goals would be advanced if Petitioner prevails on her claims against the USOC.

This Court should grant a writ of certiorari in this case in order to resolve this important issue of federal law, and to preserve the right of all American athletes to hold the USOC accountable for the manner in which it determines their eligibility to compete in Olympic sports.

II

CONCLUSION

The Seventh Circuit Court of Appeals's decision in this case would leave without a remedy American athletes who are harmed by the manner in which international Olympic federations such as Respondents carry out their drug testing activities. This Court should grant a writ of certiorari to decide whether that is the result intended by Congress under either the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards or under the Amateur Sports Act.

Respectfully submitted,

James E. Coleman, Jr.
Counsel of Record
Duke University School of Law
Box 90360
Durham, NC 27708-0360
919/613-7057

Attorney for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Decided March 27, 2001]

No. 99-4146

MARY DECKER SLANEY,
Plaintiff-Appellant,

v.

THE INTERNATIONAL AMATEUR ATHLETIC FEDERATION and THE UNITED STATES OLYMPIC COMMITTEE,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP-99-0502-C-D/F--**S. Hugh Dillin**, *Judge*.

ARGUED January 19, 2001

Before FLAUM, *Chief Judge*, and POSNER and RIPPLE, *Circuit Judges*.

FLAUM, *Chief Judge*. Former Olympic runner Mary Decker Slaney ("Slaney") brought suit against the International Amateur Athletic Federation ("IAAF") and the United States Olympic Committee ("USOC") shortly after an IAAF arbitration panel determined that Slaney had committed a doping offense. Slaney's complaint raised a litany of state-law claims which the district court determined it lacked subject matter jurisdiction over because of the applicability of The New York Convention and the Amateur Sports Act. Additionally, the complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which the district court dismissed pursuant to Fed. R.Civ. P. 12(b)(6). Slaney now appeals the district court's decision, arguing that: (1) the New York Convention does not bar adjudication of her claims against the IAAF, (2) the Amateur Sports Act does not preempt all state-law claims by a participating athlete against the USOC, and (3) her complaint adequately alleges RICO violations. For the reasons stated herein, we affirm the decision of the district court.

I. BACKGROUND

In the course of her storied career, middle-distance runner Mary Decker Slaney has captured a multitude of United States and world records. She is considered by many to be one of the most celebrated female athletes of the past century, as well as one of the greatest runners of all-time. While Slaney began running in 1969, it was not until fifteen years later that she received international attention. At the 1984 Los Angeles Games, Slaney was considered a favorite to medal in the 3000 meters competition. While the world watched on, half-way through the race, Slaney began jostling for position with Zola Budd, a South African born, barefooted

runner. When the pair became entangled, Slaney was tripped up by Budd. Slaney tumbled onto the infield, injuring her hip. As she crashed to the infield, any chance for an Olympic medal came crashing down with her. To this day, an indelible picture of Slaney, fallen on the side of the track and writhing in pain, remains in the minds of many who witnessed the event.

Slaney rebounded from her Olympic defeat and continued to compete, overcoming countless injuries. In June of 1996, she competed in the 5000 and 1500 meter races in the national trials for the Atlanta Olympics. Following her 5000 meter race, Slaney provided the USOC[1] with a urine sample which was tested for prohibited substances including exogenous testosterone. Because current technology cannot detect the presence of prohibited testosterone in the body, testing programs measure the ratio of testosterone to epitestosterone ("T/E") in the body. This test, referred to as the T/E test, assumes that an ordinary T/E ratio in humans is one to one, and thus any ratio of above six to one is consistent with "blood doping." The ratio was established at six to one in order to account for non-doping factors that might cause elevated ratios in female athletes. Factors which may influence T/E ratio include an individual changing birth

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[1]The USOC, located in Colorado Springs, Colorado, is the National Olympic Committee for the United States. This status dictates that the USOC carry out the mission of the International Olympic Committee ("IOC") and the Olympic Movement in this country. Because the IOC has promulgated a drug testing program, the USOC administers that program in the United States for all qualifying competitions for the Olympic Games.

control pills, age, menstrual cycle, bacterial contamination of the urine sample, and alcohol use.

Slaney's test was conducted at the University of California at Los Angeles ("UCLA") Laboratory. The test revealed that Slaney's T/E ratio was elevated significantly beyond the permitted six to one ratio.[2] The laboratory notified both the USOC and the IAAF[3] of its findings. According to Slaney, the USOC informed United States of America Track and Field, Inc. ("USATF")[4] of its mandatory duty to

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[2]Specifically, Slaney's samples tested at ratios of 9.5:1 to 11.6:1.

[3]The IAAF is an unincorporated organization based out of Monaco, which was founded to coordinate and control track and field activities around the world. The IAAF, which has a membership of federations representing over 200 nations and territories, establishes worldwide rules for track and field competitions which are embodied in the IAAF Constitution and other regulations. Each federation governs track and field competitions within its own territory and has agreed with all other federations to follow IAAF rules in doing so.

[4]In addition to its Olympic duties, the USOC has been designated as the coordinating body for all amateur sports in this nation by the Ted Stevens Olympic and Amateur Sports Act ("Amateur Sports Act"), 36 U.S.C. § 220501 *et seq.* Under the Amateur Sports Act, the USOC is required to select a national governing body for each amateur sport. For track and field, the USATF, an Indianapolis corporation, has been designated as the governing body. As the national governing body, the USATF is subject to the Amateur Sports Act. Furthermore, the USATF is also a member of the IAAF, and is responsible for enforcing the IAAF's

investigate whether Slaney's specimen should be declared positive for testosterone. However, it appears that the USATF played no such role, as the actual investigation was conducted by the IAAF. The IAAF's investigating doctor analyzed Slaney's samples, her past test results, and two additional samples. Slaney claimed that her elevated level was the result of (1) her menstrual cycle, and (2) her changing of birth control pills. Furthermore, Slaney posited that there was no scientific validity to the hypothesis that a T/E ratio above six to one was not normal for female athletes. Nonetheless, on February 5, 1997, the IAAF adopted the investigating doctor's recommendation and found Slaney's specimen positive for the prohibited substance testosterone.

As a result of the IAAF's decision, IAAF and USOC rules required the USATF to hold a hearing to determine whether Slaney had committed a doping offense. Slaney asked the USATF Custodial Board to dismiss her case, and also filed a complaint with the USOC under its rules. The USOC complaint alleged that the USATF proceedings against her violated the Amateur Sports Act as well as the USOC Constitution and By-Laws. Specifically, the complaint alleged that the use of the T/E test on female athletes had not been scientifically validated, that the test discriminated against women by shifting the burden to an athlete to prove by clear and convincing evidence that she was innocent, and that the IAAF had failed to conduct a proper investigation.

Concerned with the dilatory nature of the USOC and the USATF proceedings, on June 10, 1997, the IAAF

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rules and regulations.

suspended Slaney on an interim basis. The suspension occurred just prior to the National Track and Field Championships in Indianapolis. Furthermore, the IAAF ensured compliance with the suspension by invoking its contamination rule, whereby anyone who competed with a suspended athlete (in this instance Slaney) would themselves be suspended. The IAAF's actions prompted the USATF Custodial Board to suspend Slaney pending a hearing before the USATF Doping Hearing Board, effectively mooting her motion to dismiss the case against her.

Slaney received her hearing before the USATF Doping Hearing Board on September 14, 1997. The Hearing Board, unpersuaded by the testimony of the IAAF's investigating doctor, unanimously determined that no doping violation had occurred. Satisfied with the USATF Hearing Board's finding that the IAAF's rules regarding the use of the T/E ratio test were vague and inconsistent and the six to one ratio was not scientifically proven to be inconsistent with the normal ratio in humans, Slaney withdrew her complaint with the USOC.

The IAAF was unsatisfied with the USATF Hearing Board's findings, and invoked arbitration of the USATF's decision.[5] Slaney and the USATF opposed arbitration, but

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[5]Because of indications, during the late 1970's, that some national track and field federations were turning blind eyes to their athletes' drug abuse, the IAAF established worldwide testing procedures and eligibility rules. Rules 21-23 require all disputes between the IAAF and members to be submitted to an arbitration panel.

both were represented before the IAAF Arbitral Panel ("the Tribunal"). In late January 1999, the Tribunal issued an interlocutory decision upholding the IAAF's interpretation of how to adjudicate a testosterone doping offense, and found that the rules were neither vague nor inconsistent. Thus, once the IAAF showed that Slaney had a T/E ratio greater than six to one, Slaney had to come forth and show by clear and convincing evidence that the elevated ratio was attributable to a pathological or physiological condition. Believing that it was scientifically impossible to prove by clear and convincing evidence that her high T/E ratio was due to pathological or physiological factors, Slaney withdrew from the arbitration, followed by the USATF. Ultimately, the Tribunal ruled that Slaney had committed a doping offense.

Slaney filed suit in the District Court for the Southern District of Indiana raising numerous state-law contract and tort claims against both the IAAF and the USOC. Slaney also alleged that the organizations had violated the RICO Act, 18 U.S.C. § 1961 *et seq.* On November 5, 1999, the district court entered a judgment and order dismissing Slaney's state-law claims against the IAAF and USOC pursuant to Fed.R.Civ. P. 12(b)(1), and dismissing Slaney's 18 U.S.C. §§ 1962(c) and (d) claims pursuant to Fed.R.Civ. P. 12(b)(6). Specifically, the district court held that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 ("New York Convention"), barred Slaney's claims against the IAAF, as those claims had been the subject of a valid arbitration decision. With regard to Slaney's claims against the USOC, the court held that the Amateur Sports Act, 36 U.S.C. § 220501 *et seq.*, gives the USOC the exclusive right to determine disputes over eligibility and does not create a

private right of action. Finally, while the court held a RICO claim could theoretically be maintained against the USOC, Slaney's complaint did not "come close to fitting the family of claims Congress intended the RICO statute to cover," nor did it adequately allege a violation of the RICO conspiracy provision.

Slaney now appeals the decision of the district court. She contends that (1) the New York Convention does not bar her claims against the IAAF, (2) the Amateur Sports Act does not preempt all state-law claims made by an athlete against the USOC, and (3) her complaint adequately alleges a RICO claim against the USOC.

II. DISCUSSION

A. STATE-LAW CLAIMS AGAINST THE IAAF

Slaney's first contention on appeal is that the district court erred in dismissing her claims against the IAAF pursuant to Fed.R.Civ. P. 12(b)(1) . The district court determined that the IAAF arbitration decision was covered by the New York Convention. As such, the district court could not entertain claims that would "undermine or nullify the Tribunal's decision." The court concluded that Slaney's present claims were sufficiently related to the subject matter of the arbitration decision so as to pose a barrier to federal jurisdiction under Rule 12(b)(1), and further held that none of the New York Convention defenses towards enforcement of foreign arbitration awards applied to Slaney's situation. In her present appeal, Slaney challenges the district court's decision dismissing her IAAF claims, arguing that (1) Slaney is not subject to the New York Convention, in that she has never

agreed-- in writing or by actions--to arbitrate all disputes with the IAAF; (2) the claims raised in Slaney's complaint are separate and distinct from the matter decided by the IAAF; and (3) she has defenses under the New York Convention that preclude enforcement of the IAAF arbitration award against her.

A district court's dismissal of a complaint under Fed.R.Civ. P. 12(b)(1) is a legal determination which we review *de novo*. *See Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000). According to 9 U.S.C. § 201, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) shall be enforced in the United States courts. Article II of the Convention speaks to the requirements of states that have signed on to the Convention. Specifically, the section states that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Furthermore, the article requires that "[t]he court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." If an award has been rendered, that award must be enforced unless the party against whom enforcement is sought presents evidence that one of the limited defenses enumerated under Article V of the Convention is applicable. For purposes of this appeal, we note that both the United States and Monaco

are signatories to the Convention, such that the United States is bound to enforce arbitral awards validly rendered in that country.

In analyzing the merits of Slaney's appeal, we proceed in a systematic fashion. First, we must examine the decision rendered by the IAAF arbitration panel and determine the specific findings made by that Tribunal. Second, we shall examine the state-law causes of action that Slaney now brings against the IAAF in her complaint to the district court, and determine whether in fact those claims seek relitigation of an issue determined by the arbitration. If we determine that adjudication of Slaney's present claims would necessitate a reexamination of matters decided by the arbitration decision, we must resolve whether the arbitration decision, which took place on foreign soil, should be recognized by the courts, and thus deprive us of subject-matter jurisdiction over the present claims. Finally, assuming that we are theoretically obligated to recognize the decision of the Tribunal, we must inquire whether any defense to enforcement is applicable.

1. Decision of the Tribunal

The April 25, 1999 opinion of the IAAF arbitral panel begins by expounding on the reasoning behind its interlocutory opinion. Setting forth the evidentiary procedure, the Tribunal notes that the initial burden of proof rests with the IAAF to show that an athlete has a T/E ratio greater than the 6:1 established limit. If the IAAF can do so, according to the Tribunal, the Federation has provided sufficient evidence for the sample to be deemed positive. At that point, the burden is shifted to the athlete, who must prove by clear and convincing evidence that the elevated T/E ratio was due to

pathological or physiological conditions. In making this analysis, the Tribunal drew from the IAAF rules on testing for testosterone.

With the evidentiary procedure established, the Tribunal continued to consider whether Slaney had committed a doping offense. The Tribunal noted that the IAAF had established that both of Slaney's specimens had been analyzed as having T/E ratios significantly higher than 6:1. The tribunal also observed that Slaney's longitudinal study revealed a previous T/E ratio high of 3:1; meaning that her present ratio, by the most modest of calculations, was more than three times greater than she had ever previously tested. Thus the burden was shifted to Slaney to produce a valid explanation for the findings. The Tribunal noted that Slaney had produced no evidence, let alone that of a clear and convincing nature, to prove that her elevated ratio was the result of pathological or physiological factors. Since Slaney had withdrawn from the proceedings, and refused to tender her medical records to the Tribunal, the panel was forced to conclude under the burden-shifting procedure it had outlined that Slaney was guilty of a doping offense on June 17, 1996.

2. Slaney's Present Complaint and its Relationship to the Tribunal's Decision

Keeping in mind the orbit of the Tribunal's decision, we now turn to examine Slaney's present state-law causes of action against the IAAF. Slaney raises six such claims: breach of contract, negligence, breach of fiduciary duty of good faith and fair dealing, fraud, constructive fraud, and negligent misrepresentation. Putting aside Slaney's amorphous allegations of misrepresentations, we note that her complaints

center around the claim that the IAAF violated its obligations to Slaney by "using the T/E ratio as a proxy for doping in women." Thus, she alleges that the Federation failed to properly investigate her urine sample. Though Slaney does not specify how she was damaged by the implementation of the T7E test (for reasons that will become pellucid during our discussion of Slaney's state-law claims against the USOC), the answer is apparent. The implementation by the IAAF of a burden-shifting approach to proving ingestion of testosterone damaged Slaney in that, as a result, she was unable to disprove that she had committed the offense--resulting in her suspension.[6]

We conclude that Slaney's present complaint seeks to address issues decided by the Tribunal. During the course of the IAAF arbitration, Slaney presented two positions: (1) that the IAAF's T/E ratio test for determining ingestion of exogenous testosterone was invalid, and (2) that it could not be proven that Slaney had committed a doping violation. Though Slaney attempts to limit the import of the Tribunal's decision, characterizing that decision as merely a finding that she had a T/E ratio above 6:1, it is incontrovertible that the arbitration panel went further, first upholding the T/E ratio test, and then determining that Slaney had committed a doping

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[6]We note that Slaney walks a tightrope throughout this portion of her appellate argument. On the one hand, in order to raise many of the causes of action she alleges, Slaney must establish that there is a contractual relationship between her and the IAAF. However, in order to maintain the action as a whole against the IAAF, Slaney must avoid any suggestion that she has a contractual relationship with the IAAF whereby she has agreed to abide by their rules, including those which compel arbitration of all disputes.

offense. As our inquiry above made transparent, Slaney's state-law claims against the IAAF seek deliberation on the identical issues. For example, in order to adjudicate whether Slaney's Fifth Count (negligence against the IAAF) is a valid claim, the court would be required to delve into whether the cause of action makes the *prima facie* case. That probing would require that the court assess whether the IAAF in fact breached its obligations to Slaney. Slaney claims that the IAAF had a duty to properly test her for drug use. Since Slaney asserts that the IAAF breached this duty by employing the T/E test, the court would *de facto* be required to determine whether the implementation of that test constituted a breach of the duty to properly test athletes. Of course, the court could not reach that decision without addressing the validity of the test itself. Likewise, any examination of damages would require an assessment of whether Slaney was properly found guilty of a doping offense. Thus, we accept the district court's finding that allowing Slaney's current action would undermine or nullify the Tribunal's decision. *See Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926, 928 (7th Cir. 1986).

3. Application of The New York Convention

Having determined that Slaney's current complaint seeks to relitigate issues previously determined by the arbitration, we now turn to the critical issue of whether we are required to acknowledge the foreign arbitration decision. If we are, then unless Slaney can present a defense to enforcement, we cannot exercise subject-matter jurisdiction over her present claims, as that would require prohibited relitigation of previously decided issues.

Slaney's primary contention in this regard is that the arbitration between herself and the IAAF need not be enforced by federal courts in that it did not satisfy the requirements of the New York Convention. First, Slaney points out that there is no agreement in writing between her and the IAAF in which she agreed to submit her claims to arbitration. Since the New York Convention states that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which . . . may arise between them in respect of a defined legal relationship," the absence of such an agreement would allow relitigation of matters decided in that arbitration. Furthermore, Slaney puts forth that even if the Tribunal's decision is recognized, that does not influence her present case, as she was not a party to the arbitration. The IAAF counters that Slaney, by becoming a member of the USATF, agreed to abide by all IAAF rules. Included within those rules is the requirement that she arbitrate all disputes with the IAAF. If the requirement of an agreement in writing is applicable, the IAAF suggests that Slaney's written agreement with the IAAF satisfies the requirement. Alternatively, the IAAF posits that the "agreement in writing" requirement of Article II of the New York Convention is immaterial in this instance, as the IAAF is not seeking to force Slaney to arbitrate her claims, but rather arguing that her present claims have already been decided by an arbitration. Additionally, because the IAAF suggests that Slaney participated in the IAAF arbitration, she cannot now raise the procedural defense of lack of an arbitration agreement.

Whether Slaney's written agreement to follow the rules of the USATF would satisfy the requirement of an agreement in writing for purposes of enforcing an arbitration

agreement with the IAAF is a question we need not resolve. Instead, we direct our inquiry to whether Slaney was a party to the IAAF arbitration, and what results flow from that fact. An examination of Slaney's actions following the IAAF's submission of the matter to the Tribunal leads to only one conclusion: Slaney was a participant in the arbitration. During the arbitration, Slaney's counsel appeared before and presented arguments to the Tribunal. Her counsel called an expert witness to testify on Slaney's behalf, filed a motion to dismiss, and a motion for summary judgment. Furthermore, Slaney's counsel moved for an interlocutory ruling regarding the burden of proof the Tribunal would apply. Given this level of participation, the district court was correct to reject Slaney's contention that she was merely an interested athlete in the proceedings.

Assuming that this case had come to the district court and the IAAF had sought to compel Slaney to arbitrate her claims, a determination as to whether there had been a writing might pose a barrier to the IAAF's position. However, that is not the case. Here, an arbitration has already taken place in which, as we have determined, Slaney freely participated. Thus, the fact that Slaney suggests there is no written agreement to arbitrate, as mandated by Article II of the New York Convention is irrelevant. *See e.g., Coutinho Caro & Co., U.S.A., Inc. v. Marcus Trading Inc.*, Nos. 3:95CV2362 AWT, 3:96CV2218 AWT, 3:96CV2219 AWT, 2000 WL 435566 at *5 n.4 (D. Conn. March 14, 2000) (recognizing a difference between the situation where a party seeks to compel arbitration and a situation in which one attempts to set aside an arbitral award that has already been issued). What is highlighted here is the difference between Article II of the Convention, which dictates when a court should compel

parties to an arbitration, and Article V, which lists the narrow circumstances in which an arbitration decision between signatories to the Convention should not be enforced.

We see no reason why, even in the absence of a writing, ordinary rules of contract law should not apply. The Second Circuit, in *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96-97 (2d Cir. 2000), *cert denied* 2000 WL 693555 (Oct. 2, 2000), noted that non-signatories to an arbitration agreement may nevertheless be bound according to ordinary principles of contract and agency, including estoppel. Our judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received. Slaney had the opportunity to show that she had never agreed to arbitrate the dispute when she was notified of the arbitration, but she let that opportunity pass. Slaney could not "sit back and allow the arbitration to go forward, and only after it was all done . . . say: oh by the way, we never agreed to the arbitration clause. That is a tactic that the law of arbitration, with its commitment to speed, will not tolerate." *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985). "If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter." *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000). Thus, we find that the Tribunal's decision must be recognized by this court, and unless a defense is present, must bar her present claims.

4. New York Convention Defenses

Slaney alternatively suggests that even if we are to determine that she is bound by the arbitration panel's decision, the New York Convention provides exceptions in which a court need not enforce a foreign arbitral decision, and that those defenses to enforcement are applicable to the Tribunal's decision.

The first such defense raised by Slaney is that the Tribunal's decision should not be enforced because she was denied the opportunity to present her case. Slaney contends that under the IAAF rules, the IAAF has the burden of proving beyond a reasonable doubt that a doping offense has occurred. Her defense, she puts forth, was that the IAAF could not scientifically prove beyond a reasonable doubt that any prohibited substance was in her urine. Thus, when the Tribunal concluded it was bound by the IAAF's position--that upon a showing that an athlete had a T/E ratio greater than 6:1 the burden shifted to the athlete to show by clear and convincing evidence that the elevated ratio was due to a pathological or physiological condition--the Tribunal in effect denied Slaney a meaningful opportunity to present her case.

Article V(1)(b) of the New York Convention states that recognition and enforcement of an award may be refused if the party against whom it is invoked furnishes proof that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or *was otherwise unable to present his case*." (emphasis added). A court of appeals reviews a district court's decision confirming an arbitration award under ordinary standards: accepting findings of fact that are not clearly erroneous and deciding questions

of law *de novo*. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48, (1995); *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1129 (7th Cir. 1997). As we have noted, in order to comport with the requirement that a party to a foreign arbitration be able to present her case, we require that the arbitrator provide a fundamentally fair hearing. *See Generica*, 125 F.3d at 1130. A fundamentally fair hearing is one that "meets the minimal requirements of fairness--adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir. 1987) (internal citation omitted). Nevertheless, parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena. *See Generica*, 125 F.3d at 1130. Specifically, concerning evidentiary matters, the Supreme Court has noted that "[a]rbitrators are not bound by the rules of evidence." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203-04 n. 4, (1956). The extent of an arbitrator's latitude is such that an "arbitrator is not bound to hear all of the evidence tendered by the parties . . . . [H]e must [merely] give each of the parties to the dispute an adequate opportunity to present its evidence and arguments." *Generica*, 125 F.3d at 1130 (citing *Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 39 (1st Cir. 1985)). It is when the exclusion of relevant evidence actually deprived a party of a fair hearing that it is appropriate to vacate an arbitral award. *See id.*

In *Generica*, we surveyed several cases in which an arbitrator's award was not enforced by the courts on the grounds raised now by Slaney. For example, in *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997), the

court held that, under the FAA § 10(a), an arbitration panel's refusal to continue hearings to allow a witness to testify, the only witness with evidence of fraud not found from other sources, was fundamental unfairness and misconduct sufficient to vacate the award. In *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992), a court also vacated an arbitration award, in that instance because the tribunal changed evidentiary rules during the hearing and thus prevented a party from presenting its documentary evidence. *See also Hoteles Condado*, 763 F.2d at 40.) (vacating award when the arbitrator excluded the only evidence available to refute the claims); *Hall v. Eastern Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975) (refusing to enforce an award because the arbitration board refused to give weight to a party's previously untendered alibi defense). Our examination of these cases leads us to conclude that Slaney's allegation has no merit. This defense to enforcement of a foreign arbitration need not apply when a panel employs a burden-shifting test in a fair manner. Slaney was not denied an opportunity to present her evidence. Rather, the arbitrator's decision merely maintained the same standard of proof the IAAF had always been guided by. As such, Slaney's complaint does not truly attack the procedure implemented by the arbitration panel, but rather an underlying evidentiary decision of the panel. Unfortunately for Slaney, as the Supreme Court has noted, arbitrators are not bound by the rules of evidence. *Bernhardt*, 350 U.S. at 203-04 n.4. Thus, this attempted defense must fail.

Slaney's final submission on this issue is that "presuming she had committed a doping offense based on a test that is scientifically invalid and discriminatory towards female athletes violated the 'most basic notions of morality

and justice.'" Slaney further postulates that "eliminating the presumption of [her] innocence based upon her elevated T/E ratio also violates explicit public policy that is well defined and dominant and is ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

According to Article V(2)(b) of the New York Convention, "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country." In *Fotocrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975), the Second Circuit noted that the public policy defense is exceedingly narrow. While Slaney states that the Tribunal's decision meets the stringent requirements of that case and others, in that the Tribunal's decision violated the "most basic notions of morality and justice," *id.*, and that enforcement would entail a violation of a paramount legal principle that is "ascertained by reference to the laws and legal precedents and from general considerations of supposed public interests," *Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (internal quotations omitted), she provides little support for her contention.

Reduced to its essence, Slaney contends that the burden-shifting approach adopted by the IAAF violates United States public policy. We disagree. According to the parties, proving the presence of exogenous testosterone in the body by scientific tests is not possible at the present time. Therefore, the IAAF has adopted the rebuttable presumption of ingestion

from a high T/E ratio in an athlete's urine, as detailed throughout this opinion. Were the IAAF not to make use of the rebuttable presumption, it would be nearly impossible, absent eyewitness proof, to ever find that an athlete had ingested testosterone. As the IAAF notes, criminal defendants are frequently required to come forward with proof establishing a basis for asserting affirmative defenses. *See, e.g., Martin v. Ohio*, 480 U.S. 228 (1987); *Leland v. Oregon*, 343 U.S. 790 (1952). We hope that at some juncture, science will develop a means for detecting exogenous testosterone in athletes, such that an athlete's T/E ratio of 11.6:1 can be discounted if it is based on innocent factors. However, until that point in time, we are confident that requiring an athlete to prove by clear and convincing evidence that her elevated ratio was due to pathological or physiological factors does not invoke a violation of United States public policy as federal case law has required in order for a court to refuse to enforce a foreign arbitral award.

Thus, having found that (1) Slaney participated in the IAAF arbitration, (2) her present state-law complaint seeks to relitigate issues decided by the IAAF Tribunal, (3) the New York Convention mandates enforcement of the arbitrator's decision, and (4) there is no defense that should bar enforcement of the arbitration decision, we find that the district court did not err in dismissing Slaney's state-law claims against the IAAF pursuant to Fed.R.Civ. P. 12(b)(1).

B. STATE-LAW CLAIMS AGAINST THE USOC

Much as it does against the IAAF, Slaney's complaint alleges state-law violations against the USOC. And, much like it did with regard to the state-law claims against the IAAF,

the district court dismissed Slaney's state-law claims against the USOC, pursuant to Rule 12(b)(1). The district court granted USOC's motion to dismiss after determining that the Amateur Sports Act preempted Slaney's state-law claims against the Committee, and that the Act did not provide for a private right of action under which Slaney could seek to have those claims addressed by the district court. Slaney challenges the decision of the district court, arguing that the preemption doctrine does not apply in this arena, such that the Amateur Sports Act poses no jurisdictional barrier to the adjudication of Slaney's state-law claims against the USOC. Once again, we review a district court's dismissal of a complaint pursuant to Fed.R.Civ. P. 12(b)(1) *de novo*. *See Massey*, 221 F.3d at 1034.

We begin by noting that Slaney does not challenge the district court's statement that the Amateur Sports Act creates no private right of action. In fact, Slaney seeks to distance her case from those in which plaintiffs have attempted to bring suit under the Act. As stated in her appellate brief, "[n]or is Mrs. Slaney seeking to pursue a claim under the Amateur Sports Act. In many of the cases cited by the District Court, the plaintiffs asserted an implied right in the Amateur Sports Act to bring an action [to] enforce the USOC's obligations under the Act. *Martinez v. USOC*, 802 F.2d 1275, 1280 (10th Cir. 1987); *Michels v. United States Olympic Committee*, 741 F.2d 155, 156 (7th Cir. 1984); *Oldfield v. Athletic Congress*, 779 F.2d 505, 507 (9th Cir. 1985); *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1191 (D.D.C. 1980). Mrs. Slaney does not dispute the results in those cases; they are simply irrelevant." Thus, we concentrate our inquiry on the issue of whether the Amateur Sports Act precludes the court from examining Slaney's state-law claims.

According to the Amateur Sports Act, one of the purposes of the USOC is to exercise exclusive jurisdiction over all matters pertaining to United States participation in the Olympic Games. *See* 36 U.S.C. § 220503(3). The Act also states that the USOC is designed "to provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations," and "to encourage and provide assistance to amateur athletic activities for women." *Id.* at §§ 220503(8), 220503(12) .

Beginning with the often quoted language from the concurrence in *Michels v. United States Olympic Committee*, the district court reiterated that "there can be few less suitable bodies than the federal courts for determining the eligibility, or procedures for determining the eligibility, of athletes to participate in the Olympic Games." 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring). From there, the court cited numerous cases which have adopted the principle that eligibility decisions fall within the USOC's exclusive jurisdiction over all matters pertaining to United States participation in the Olympic Games. For example, in *Dolan v. United States Equestrian Team, Inc.*, 257 N.J. Super. 314, 608 A.2d 434, 437 (App. Div. 1992), the court focused on the need for uniformity in determining questions of eligibility, and held "that it would be inappropriate to attribute different or unique meanings to [the Amateur Sports Act's] provisions in New Jersey and thus create a jurisdictional sanctuary from the Congressional determination that these types of disputes should be resolved outside the judicial processes." Similarly, in *Walton-Floyd v. United States Olympic Committee*, 965 S.W.2d 35, 40 (Tex. Ct. App. 1998), the court noted that "[t]he interest of maintaining consistent interpretations among jurisdictions requires the Act to pre-empt claims asserted

under state tort law. To hold a common law duty exists outside the scope of the Act, thereby enabling an individual athlete to bring suit, threatens to override legislative intent and opens the door to inconsistent interpretations of the Act." We agree with the district court and the courts in *Dolan* and *Walton-Floyd* that strict questions of athletes' eligibility are preempted by the Amateur Sports Act's grant of exclusive jurisdiction to the USOC over all matters pertaining to United States participation in the Olympic Games. However, that conclusion does not end our analysis.

Despite the fact that the district court specifically noted its ruling was not based on a finding that the Amateur Sports Act was a complete preemption to all state-law claims, Slaney devotes an ample portion of her brief to arguing that the complete preemption doctrine should not be applied in this context. There is no disagreement that state-law causes of action can be brought against the USOC. However, when it comes to challenging the eligibility determination of the USOC, only a very specific claim will avoid the impediment to subject matter jurisdiction that § 220503(3) poses.

In *Foschi v. United States Swimming Inc.*, 916 F. Supp. 232 (E.D.N.Y. 1996)--a case relied upon by Slaney for the proposition that the Amateur Sports Act does not create complete preemption--the court addressed issues of federal jurisdiction in the context of state-law claims against the USOC, and other amateur athletic organizations. While the district court did not dismiss those claims as being preempted by the Amateur Sports Act, that decision can be understood by examining the claims alleged. There, the plaintiff alleged that her contractual due process right was violated when United States Swimming, among other things, contravened its

own rules. *See id.* at 237. While there is no dispute that the USOC has exclusive jurisdiction when it comes to eligibility determinations, the courts can still play a role in ensuring that the organization follows its rules for determining eligibility. The extent of the courts' powers in this area was previously examined by way of a suit brought by an athlete who captured the world's attention for reasons other than her competitive achievements. In *Harding v. United States Figure Skating Ass'n*, 851 F. Supp. 1476, 1479 (D. Or. 1994) vacated on other grounds, 879 F. Supp. 1053 (D. Or. 1995), the court defined (we believe correctly) the limited role that federal courts should play in eligibility determinations. There, the court cautioned that "courts should rightly hesitate before intervening in disciplinary hearings held by private associations . . . . Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies." Yet, while carving out this limited exception to the preemption created by the Amateur Sports Act, the opinion forewarned that while examining whether internal rules had been complied with, the courts "should not intervene in the merits of the underlying dispute." *Id.*

With this understanding of the limits of preemption, we turn to Slaney's claims against the USOC. Slaney suggests that nothing in the Act precludes her from bringing her state-law claims regarding the USOC's administration of its drug testing program, and specifically "the unlawful manner in which the USOC conducts its doping program." Based on our analysis above, we disagree. An inspection of the state-law claims that Slaney brings against the USOC reveals that,

despite her best efforts to suggest to the contrary, Slaney is challenging the method by which the USOC determines eligibility of its athletes. Slaney's first state-law cause of action against the USOC is a breach of contract claim. Slaney suggests that the USOC violated its contractual obligations to Slaney by which she suffered damages. While Slaney attempts to skirt the issue, what she is actually alleging is that she was injured by the USOC's determination that she was ineligible to compete. Similarly, Slaney's negligence claim against the USOC posits that the USOC breached a duty to Slaney by using the T/E ratio as a proxy for doping, and that as a result Slaney was damaged. Slaney's other state-law claims are no different. Examination of any of those claims would require an Article III court to examine as an underlying issue the validity of the T/E test, an endeavor we cannot partake in.

We note that throughout her complaint Slaney attempts to avoid any mention of the fact that her damages arise from the USOC's determination regarding her eligibility. We assume that such a tactic is a recognition of what we have already stated: the USOC has exclusive jurisdiction, under the Amateur Sports Act, to determine all matters pertaining to eligibility of athletes. Yet, Slaney cannot escape the fact that her state-law claims, whether framed as breach of contract, negligence, breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation, are actually challenges to the method by which the USOC determines eligibility of athletes. Slaney does not suggest that the organization contravened its own guidelines, and as Slaney freely admits, the Amateur Sports Act creates no private cause of action. Thus, the district court was correct in determining that it lacked subject matter jurisdiction over Slaney's state-law

claims against the USOC and thus in dismissing those causes of action pursuant to Fed. R.Civ. P. 12(b)(1).

C. RICO CLAIMS

Slaney's final contention on appeal is that the district court erred in dismissing her RICO claims against the USOC.[7] In her complaint, Slaney alleges that the USOC conducted and continues to conduct the drug testing affairs of the "Olympic Movement" through a pattern of racketeering activity. Slaney puts forth that the Olympic Movement is the principal international association of sports organizations and persons. The Movement, which she posits operates under the supreme authority of the International Olympic Committee ("IOC"), is comprised of the international federations, national Olympic committees, organizing committees of the

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[7]The original RICO claim was brought against both the IAAF and the USOC. However, the district court only analyzed the claim as it pertained to the USOC, determining that the Tribunal's decision removed subject matter jurisdiction over Slaney's claim against the IAAF. On appeal, Slaney has not challenged the dismissal of the RICO claim against the IAAF, but rather only argues that the district court erred in misapplying the law with regard to the RICO claim against the USOC. We do note that by challenging the applicability of the New York Convention as a bar against her claims, Slaney has in fact challenged the foundation upon which the dismissal of her IAAF RICO claim was granted. However, because we determined above that the New York Convention does in fact preclude all of Slaney's claims against the IAAF, we need not further address the district court's decision regarding the IAAF RICO claim. Thus, as the district court did, we focus our inquiry on Slaney's RICO claim against the USOC.

Olympic games, national associations, clubs and the athletes. According to the complaint, the Movement's drug testing program "is a fraud, designed in principal if not exclusive part to protect the commercial value of the Olympic and subsidiary organizations, properties and their product." The district court, relying in part on our decision in *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997), determined that Slaney's claim against the USOC "does not come close to fitting the family of claims Congress intended the RICO statute to cover." Thus, the court dismissed Slaney's 18 U.S.C. § 1962(c) claim. The court also held that Slaney had failed to allege a violation of the RICO conspiracy provision, and that hence she had failed to state a proper claim under 18 U.S.C. § 1962(d).

We review a district court's dismissal of a complaint pursuant to Fed. R.Civ. P. 12(b)(6) *de novo*, and accept all factual allegations in the complaint and draw all reasonable inferences from those facts in favor of the plaintiff. *See Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000). However, the court is not required to ignore facts alleged in the complaint that undermine the plaintiff's claim. *See Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir. 1993). In evaluating the dismissal of Slaney's complaint, we examine the complaint as a whole and will affirm the district court's order of dismissal only if it appears beyond doubt that Slaney can prove no set of facts in support of her claim which would entitle her to relief. *See Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927, 930 (7th Cir. 1998) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Furthermore, allegations of fraud in a civil RICO complaint are subject to the heightened pleading standard of Fed. R.Civ. P. 9(b), which requires a plaintiff to plead all averments of fraud with

particularity. *See Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 726 (7th Cir. 1998). Accordingly, a RICO plaintiff must, at a minimum, describe the two predicate acts of fraud with some specificity and state the time, place, and content of the alleged false representations, the method by which the misrepresentations were communicated, and the identities of the parties to those misrepresentations. *See id.* at 726, 72829; *see also, Lachmund v. ADM Investor Serv., Inc.*, 191 F.3d 777, 784 (7th Cir. 1999). Finally, an appellate court may affirm the district court's dismissal on any ground supported by the record, even if different from the grounds relied upon by the district court. *See Triad Ass'n v. Chicago Hous. Auth.*, 892 F.2d 583, 594 (7th Cir. 1989).

1. Sufficiency of Allegations Under § 1962(c)

In order to state a viable cause of action under § 1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).[8] Taking the facts alleged in Slaney's complaint as true (without vouching for their truth), the USOC is the domestic representative or agent of the IOC and is responsible for

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[8]18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

carrying out the mission of the IOC and the Olympic Movement. The USOC is subject to the IOC's drug testing program, which it carries out in the United States, and is a member of the Olympic Movement. Finally, the Olympic Movement is subject to the supreme authority of the IOC. Thus, Slaney posits, the USOC are "persons" associated with the "enterprise", that is the Olympic Movement.

Slaney's RICO claim against the USOC is legally insufficient for a number of reasons. As the district court did, we will first examine whether Slaney's complaint satisfies the conduct prong of a 1962(c) cause of action.[9] According to the Supreme Court, in order to have conducted or participated in the enterprise's affairs under § 1962(c), the person charged must have had some part in directing those affairs. *See Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). "In other words, she must have participated in the operation or the management of the enterprise itself, and she must have asserted some control over the enterprise." *United States v. Swan*, 224 F.3d 632, 635 (Tth Cir. 2000). Slaney suggests that because the USOC is responsible for administering the

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[9]Slaney suggests that because the district court focused on the conduct and pattern prongs of the RICO cause of action, that it presumably found the other elements adequately alleged. We disagree. Since a cause of action under 1962(c) requires four distinct elements, once the district court determined that Slaney's complaint did not adequately state a claim for relief because one of those elements was lacking, it was under no obligation to address the remaining elements. In this opinion, we do not address all four elements of a 1962(c) claim. However, by no means do we suggest that our silence on these elements indicates that we find them adequately alleged.

drug testing program in the United States, that the USOC conducts the affairs of the enterprise. While Slaney is correct that § 1962(c) does not require the individual (here, the USOC) to have absolute domination over the enterprise (in this instance, the Olympic Movement), RICO does require that the person have had some control over the enterprise itself. *See Swan*, 224 F.3d at 635.

Slaney's complaint fails to allege that the USOC exerts any control over the Olympic Movement. In fact, Slaney's description of the Olympic Movement suggests a structure in which the USOC could not have directed the enterprise's affairs. The complaint suggests the Movement as operating "under the supreme authority of the IOC" which has sole responsibility for allowing members into the Movement. The USOC is described as merely a "domestic representative or agent . . . responsible for carrying out the mission of the IOC." The complaint is devoid of any suggestion that as an agent, the USOC took part in managing the Movement.

At best, Slaney has alleged that the USOC has been delegated the authority by the Movement to conduct the drug testing program in the United States. However, as we have made patent, "simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to submit an individual to RICO liability under § 1962(c)." *Goren*, 156 F.3d at 728. Rather, we require that "the defendant must participate in the operation or management of the enterprise." *Id.* at 727. Slaney's complaint contains no allegation that the USOC, as an individual, had any control over the enterprise itself. While Slaney suggests such lack of control is "besides the point," the Supreme Court has held to the contrary. *See Reves*, 507 U.S. at 179. We

cannot draw the conclusion that USOC's control over one aspect of the Olympic Movement's activities in this country translates into the USOC having had control over the Movement as an enterprise. Simple exertion of control over one aspect of an enterprise's activities does not evince control over the enterprise itself.

Even if Slaney's complaint could be read to allege that the USOC took some part in directing the Olympic Movement's affairs, it fails (as the district court noted) to satisfy the pattern requirement of 1962(c) because it fails to plead sufficient facts to show that the USOC engaged in a pattern of racketeering activity. As stated above, a pattern of racketeering activity consists, at a minimum, of two predicate acts of racketeering (committed within a ten-year time period). *See Goren*, 156 F.3d at 728. Here, Slaney advances the predicate acts of mail and wire fraud. *See* 18 U.S.C. §§ 1341, 1343. As we noted earlier, a plaintiff alleging predicate acts of mail and wire fraud must do so with particularity. *See* Fed. R.Civ. P. 9(b). In order to satisfy this standard, a RICO plaintiff must allege the identity of the person who made the representation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff. *See Vicom, Inc. v. Harbridge Merchant Serv., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994). Moreover, because a RICO plaintiff must allege two predicate acts of fraud, she must satisfy the requirements of Rule 9(b) twice. *See Emery v. American Gen. Fin., Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998).

After examining Slaney's complaint, we find that she has failed to allege a pattern of racketeering activity with sufficient particularity to satisfy the requirements of Rule

9(b). Slaney's complaint asserts that the USOC "used and continues to use the mails and wires to convey their false and deceptive communications to and about Mrs. Slaney, which communications were and continue to be an integral component of the fraudulent scheme." To satisfy the particularity requirements of Rule 9(b), Slaney suggests that we examine paragraphs 1-104 of her complaint.[10] A perusal of the complaint convinces this Court that Slaney has not alleged two predicate acts. According to Slaney, the USOC informed the USATF that it was mandatory for the USATF to conduct an investigation of Slaney's urine sample before she could be declared positive for prohibited testosterone. Slaney suggests that this information was first transmitted to the USATF on June 28, 1996 and then again two weeks later. As such, Slaney suggests that we find that the pattern requirement of RICO has been satisfied.

Slaney has not presented any case law, nor have we found any precedent for the proposition that a single fraudulent representation, reiterated once over a two-week period can constitute a pattern of racketeering for 1962(c) purposes. In *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), we held that a single fraudulent scheme

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[10]We do not believe that in most cases it is proper for a plaintiff to attempt to satisfy the particularity requirement of 9(b) through an incorporation of the entire complaint into the RICO claim. In this instance, the 104 paragraphs in Slaney's complaint reference numerous mail and wire transactions, most of which were completely innocuous. Though we examined the alleged predicate acts contained in those paragraphs, we note that such a nebulous identification of predicate acts could be grounds enough to find that Slaney had failed to meet the particularity requirement of 9(b) .

with only one injury to one victim was not a "pattern of racketeering activity" under § 1962(c) simply because it required several acts of mail and wire fraud to inflict the single injury. In so holding, we noted that mail fraud and wire fraud are perhaps unique among the various sorts of "racketeering activity" possible under RICO in that the existence of a multiplicity of predicate acts may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate into a "pattern" of racketeering activity. *See Lipin*, 803 F.2d at 325; *see also Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278-79 (7th Cir. 1989); *Tellis v. United States Fidelity & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1986) (multiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to one basic transaction cannot constitute the necessary pattern). Nor is the fact that Slaney suggests the USOC continues to conduct the drug testing program in the United States sufficient to plead the pattern requirement. "Indeed, we have repeatedly held that a plaintiff's conclusory allegations that 'defendants' also defrauded unidentified 'others' are not enough to plead the requisite pattern of fraud." *Goren*, 156 F.3d at 729. Because the single representation that the USATF would conduct the investigation into Slaney's urine sample is the only fraud alleged in the complaint, that complaint fails to state a claim under § 1962(c). Thus, the district court was correct when it noted that Slaney's claim does not come close to fitting the family of claims Congress intended the RICO statute to cover.[11]

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[11]We also entertain serious doubt as to whether Slaney has sufficiently alleged an enterprise, as required by 1962(c). Slaney's

2. Sufficiency of Allegations Under § 1962(d)

We have long recognized that § 1962(d) 's target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves. *See Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 348 (7th Cir. 1992).[12] Accordingly, it is the well-established law of this Circuit that an individual can be charged under § 1962(d) even if he personally does not agree to commit two predicate acts of racketeering. *See Goren*, 156 F.3d at 731. "[T]he touchstone of liability under § 1962(d) is an agreement to participate in an endeavor which, if completed, would constitute a violation of the substantive statute." *Id.* at 732. Hence, in order to state a viable claim for conspiracy under § 1962(d), a plaintiff must allege that (1) the defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity, and (2) the defendant further agreed that someone would commit at

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complaint has merely defined the enterprise through the manner in which it operates. But, "[t]his court has repeatedly stated that RICO plaintiffs cannot establish structure by defining the enterprise through what it supposedly does." *Stachon*, 229 F.3d at 676. Though a pattern of racketeering activity may be the means by which an enterprise interacts with society, it is not itself the enterprise, "for an enterprise is defined by what it is, not what it does." *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990).

[12] 18 U.S.C. § 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

least two predicate acts to accomplish those goals. *Lachmund*, 191 F.3d at 784.

Slaney's complaint did not allege a violation of the RICO conspiracy statute. Nonetheless, the district court was correct to address whether there had been a violation of that section of RICO. The fact that a complaint does not reference 1962(d) is no obstacle to our consideration of whether Slaney's complaint states a claim under § 1962(d) because under the notice pleading regime of the Federal Rules of Civil Procedure, plaintiffs are not required to plead legal theories. *See Goren*, 156 F.3d at 730 n.8. "Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations." *Bartholet v. Reishauser A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992).

Slaney's complaint is wanting for any allegation that the USOC agreed to violate RICO. As the district court noted, the closest the complaint comes to alleging any sort of agreement is in the statement that the USOC ordered the UCLA laboratory not to hand over to Slaney any information regarding the laboratory's analysis of her specimen. Yet, as the court noted, there is not even a hint that this command by the USOC was given with any motivation to participate in the fraudulent affairs of the Olympic Movement or an agreement to commit two predicate acts. Thus, Slaney results to bolstering her 1962(d) claim by introducing new evidence and drawing inferences from those materials that the USOC is engaging in a conspiracy to violate RICO. We have consistently frowned upon such essays to cure pleading deficiencies by means of introducing new factual support in

appellate briefs. Put simply, "the pleading itself must state the essential elements of the RICO action or it is worthy of dismissal." *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (1995). As a result, we find that Slaney has failed to sufficiently allege a RICO conspiracy.

III. CONCLUSION

Slaney participated in a valid arbitration with the IAAF which, under the New York Convention, we are obligated to recognize. Thus, the issue decided in that arbitration cannot be relitigated. Because adjudication of the state-law claims alleged against the IAAF in Slaney's complaint would necessitate relitigation of the issue decided in the arbitration, the district court correctly determined that it lacked subject-matter jurisdiction over those claims. Likewise, the district court correctly determined that it lacked jurisdiction to adjudicate Slaney's state-law claims against the USOC, finding that those claims were preempted by Congress's grant of exclusive authority to the USOC to determine the eligibility of American athletes. Finally, the district court correctly determined that Slaney did not state a proper claim against the USOC for violation of the federal RICO statute.

For the foregoing reasons, we Affirm the decision of the district court.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed March 27, 2001]

No. 99-4146

MARY DECKER SLANEY, *Plaintiff-Appellant*,	)
v.	)
INTERNATIONAL AMATEUR ATHLETIC FEDERATION and UNITED STATES OLYMPIC COMMITTEE, *Defendants-Appellees*.	)

BEFORE: Honorable JOEL M. FLAUM, Circuit Judge
Honorable RICHARD A. POSNER, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 99 C 502, S. Hugh Dillin, Judge

JUDGMENT - WITH ORAL ARGUMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this Date.

(1061-110393)

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed November 5, 1999]

Cause No. IP-99-0502-C-D/F

MARY DECKER SLANEY,
Plaintiff,

v.

THE INTERNATIONAL AMATEUR ATHLETIC FEDERATION and THE UNITED STATES OLYMPIC COMMITTEE,
Defendants.

JUDGEMENT and ORDER of DISMISSAL

The Court, having this day filed its Entry in this cause granting Defendants' motions to dismiss, which Entry is in the following words and figures:

(H.I.),

IT IS THEREFORE CONSIDERED AND ORDERED that Plaintiff's claims against Defendant International Amateur

Athletic Federation be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

IT IS FURTHER CONSIDERED AND ORDERED that Plaintiff's state law claims against Defendant United States Olympic Committee be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

IT IS FURTHER CONSIDERED AND ADJUDGED that Plaintiff's 18 U.S.C. § 1962(c) & (d) claims against Defendant United States Olympic Committee be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

Dated this 5th day of November, 1999.

/s/
S. Hugh Dillin
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed November 5, 1999]

Cause No. IP-99-0502-C-D/F

MARY DECKER SLANEY,
Plaintiff,

v.

THE INTERNATIONAL AMATEUR ATHLETIC FEDERATION and THE UNITED STATES OLYMPIC COMMITTEE,
Defendants.

ENTRY

This cause comes before the Court on Defendants' motions to dismiss. For the following reasons, Defendants' motions are granted.[1]

[1]In addition, the Court grants International Amateur Athletic Federation's motion to file an oversized reply brief, and accepts the attached brief.

I. BACKGROUND

A. The Parties

Plaintiff Mary Decker Slaney ("Slaney") of Eugene, Oregon, is a world famous middle distance runner. She has participated in four Olympic Games, won numerous world championships, and has held national and world records in several middle distance events. Her great athletic skill has enabled her to earn a living from track and field competitions and the endorsements, appearance fees and prize money that flows from these competitions. As a precondition to competing in national and international track and field competitions, Slaney must submit to the national and international rules and regulations which govern the sport of track and field.

Defendant International Amateur Athletic Federation ("IAAF") is an unincorporated organization founded to coordinate and control track and field activities around the world. Its membership boasts track and field federations from over 200 nations and territories. The IAAF is based out of Monaco and has a Secretariat located in Rome, Italy. It has no offices in the United States.

Defendant United States Olympic Committee ("USOC"), located in Colorado Springs, Colorado, is the National Olympic Committee for the United States. This status entails that the USOC carry out the mission of the International Olympic Committee ("IOC") and the Olympic

Movement in this country.[2] Because the IOC has promulgated a drug testing program, the USOC administers the Olympic drug testing program in the United States for all qualifying competitions for the Olympic Games.

In addition to its Olympic duties, the USOC has been designated as the coordinating body for all amateur sports in this nation by the Ted Stevens Olympic and Amateur Sports Act ("Amateur Sports Act"), 36 U.S.C. § 220501 *et seq.*[3] One of the USOC's duties under the Amateur Sports Act is to select a National Governing Body for each amateur sport. USA Track & Field, Inc. ("USATF"), an Indiana corporation located in Indianapolis, carries the distinction of being the National Governing Body for the sport of track and field.[4] This designation carries with it two responsibilities. First, as a National Governing Body the USATF is subject to the Amateur Sports Act. Second, as a National Governing Body

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[2]Slaney defines the Olympic Movement as the IOC, International Federations, National Olympic Committees, Organizing Committees of the Olympic Games, national associations, clubs, and the persons belonging to them, particularly the athletes, and judges/referees, coaches, and other sports technicians, plus any other organization or institution recognized by the IOC.

[3]The Ted Stevens Olympic and Amateur Sports Act was originally called the Amateur Sports Act and was codified at 36 U.S.C. § 371 *et seq.* The Court shall refer and cite to the earlier incarnation of the Amateur Sports Act.

[4]USATF was formerly known as The Athletic Congress of the United States, Inc.

the USATF is a member of the IAAF and is responsible for enforcing the IAAF's rules and regulations.

B. The Underlying Incident

On June 17, 1996 Slaney competed at the United States Olympic Trials in Atlanta, Georgia. Prior to the competition, Slaney completed an official USOC entry form in which she agreed to be subject to the drug testing program. After finishing second in the 5000 meter run, Slaney provided a urine specimen which was then divided into Sample A and Sample B. USOC representatives then collected and stored these samples until they could be analyzed at the IOC-accredited University of California at Los Angeles ("UCLA") laboratory. The purpose of these drug tests is to determine whether an athlete has used a prohibited substance such as testosterone to increase his or her athletic prowess.

To test for the use of testosterone, the Olympic Movement has adopted a controversial test which compares the ratio of testosterone to epitestosterone ("T/E ratio"). A T/E ratio of 6:1 or lower is considered normal, whereas a ratio higher than 6:1 is considered elevated. Here, the UCLA laboratory found that Slaney's A sample contained an elevated level of testosterone. The laboratory then notified both the USOC and the IAAF of its finding.

According to Slaney, the USOC informed the USATF of its mandatory duty to investigate whether Slaney's specimen should be declared positive for testosterone. However, it appears that the USATF acted merely as the middle-man between Slaney and the IAAF, which actually conducted the investigation. The IAAF assigned the

investigation to Dr. Christiane Ayotte, a member of the IAAF's Doping Commission as well as the Director of an IOC-accredited laboratory in Montreal, Canada. Dr. Ayotte considered the Sample A and B T/E ratios, a longitudinal study of Slaney's past test results and two additional urine specimens. In addition, Slaney provided an explanation for her elevated level of testosterone on June 17: (1) her menstrual cycle; (2) her recent use of "progesterone"-based birth control pills; and (3) there was no scientific validity to the IAAF's assertion that 6:1 was the normal T/E ratio for female athletes. It should also be noted that on several different occasions the IAAF requested an endocrine study, but none was received.

On February 5, 1997 the IAAF adopted Dr. Ayotte's recommendation and found that Slaney's specimen from June 17, 1996 was positive for the prohibited substance testosterone. As a result, IAAF and USOC rules required that the USATF hold a hearing and determine whether or not Slaney had committed a doping offense. Slaney asked the USATF Custodial Board to dismiss the case against her on February 19, 1997. In addition, Slaney filed a complaint with the USOC under its constitution and by-laws in June, 1997. This complaint alleged that the USATF proceedings against her violated the Amateur Sports Act as well as the USOC Constitution and By-laws. Specifically, this complaint alleged that the use of the T/E ratio on female athletes had not been scientifically validated, the T/E ratio test discriminated against women, shifting the burden to an athlete to prove by clear and convincing evidence that she was innocent was unlawful; and the IAAF had failed to conduct a proper investigation.

However, the IAAF felt that things were moving too slowly at the USOC and the USATF and on June 10, 1997 notified Slaney that it had suspended her from competition, effective May 30, 1997. This interim suspension took place just before the national track and field championships which were to be held in Indianapolis. In addition, the IAAF ensured that Slaney would be unable to compete at the championships by threatening to invoke its contamination rule, a rule which allows the IAAF to suspend from competition any athlete who competes in a race with a suspended athlete. This action prompted the USATF Custodial Board to suspend Slaney pending a hearing before the USATF Doping Hearing Board, effectively mooting Slaney's motion to dismiss the case against her.

Slaney received her hearing before the USATF Doping Hearing Board on September 14, 1997 in Chicago. The USATF relied primarily on Dr. Ayotte's testimony in prosecuting the alleged violation. However, the Hearing Board found this testimony unpersuasive and on September 16, 1997 it unanimously found that no doping violation had occurred. The Hearing Board issued a written opinion to this effect on October 17, 1997. Satisfied with the USATF Hearing Board's finding that the IAAF's rules regarding the use of the T/E ratio test were vague and inconsistent and that the 6:1 ratio was not scientifically proven to be consistent with the normal ratio in humans, Slaney withdrew her complaint with the USOC.

The IAAF was decidedly unsatisfied with the USATF Hearing Board's findings, however, and invoked arbitration of the USATF's decision. Slaney and the USATF opposed arbitration, but both were represented before the IAAF

Arbitral Panel ("the Tribunal"). The USOC declined to intervene on Slaney's behalf and took no part in the arbitration. In late January, 1999 the Tribunal issued a pivotal interlocutory ruling. This ruling upheld the IAAF's interpretation of how to adjudicate a testosterone doping offense and found that the rules were not vague and inconsistent. Consequently, once the IAAF showed that Slaney had a T/E ratio greater than 6:1, Slaney must come forth and show by clear and convincing evidence that the elevated ratio was attributable to a pathological or physiological condition. The Tribunal then adjourned until April 24, 1999.

Believing it scientifically impossible to prove by clear and convincing evidence that her high T/E ratio was due to pathological or physiological factors, Slaney withdrew from the arbitration. The USATF followed suit. Ultimately the Tribunal ruled that Slaney had committed a doping offense.

C. Slaney's Lawsuit

Slaney filed this lawsuit shortly after withdrawing from the IAAF arbitration. Count I alleges that the USOC and the IAAF violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* Her complaint also alleges that the USOC committed the state law claims of breach of contract (Count II), negligence (Count IV), breach of fiduciary duty of good faith and fair dealing (Count VI), fraud (Count IX), constructive fraud (Count XI) and negligent misrepresentation (Count XIII). Further, her complaint charges the following state law claims against the IAAF: breach of contract (Count III), negligence (Count V), breach of fiduciary duty of good faith and fair dealing (Count

VII), fraud (Count X), constructive fraud (Count XII), and negligent misrepresentation (Count XIV).[5]

The USOC has moved to dismiss all the claims against it pursuant to Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief may be granted). The IAAF moves to dismiss the claims against it pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2) (lack of personal jurisdiction) and 12(b)(6).

II. ANALYSIS

Although the phrases personal jurisdiction and subject matter jurisdiction fall trippingly off the tongue, issues of jurisdiction can often prove quite troublesome. Such is the case here. District courts generally resolve questions of subject matter jurisdiction first. Ruhgras AG v. Marathon Oil Co., 143 L. Ed. 2d 760, 767 (1999). Seeing no reason to deviate from this custom, the Court shall first determine whether subject matter jurisdiction exists over the IAAF and the USOC.

A. Subject Matter Jurisdiction

1. IAAF's 12(b)(1) motion[6]

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[5]Slaney's complaint does not contain a Count VIII.

[6]Because this is an inquiry into subject matter jurisdiction, the Court can consider matters outside the pleadings without converting the proceeding to a summary judgment motion. Capitol Leasing Co. v. F.D.I.C., 999 F.2d 188, 191 (7th Cir. 1993).

Slaney admits to being subject to the rules and regulations of the IAAF at all relevant times. As such, the IAAF contends that Slaney was subject to the IAAF's rule that all decisions of the Tribunal "shall be final and binding on all parties, and on all Members of the IAAF." IAAF Rule 21(4). Here, the Tribunal, located in Monaco, handed down a decision in favor of the IAAF.

Although Slaney frames her claims as RICO, breach of contract, negligence, breach of fiduciary duty, fraud, constructive fraud and negligent misrepresentation, the IAAF argues that what Slaney is really trying to do is have the Court reconsider the same issues that were decided in arbitration. This the Court cannot do, as the New York Convention ("the Convention") prohibits any courts other than those of the country where the award was made from vacating an arbitration award. *See* 9 U.S.C. § 201.[7]

Not surprisingly, Slaney vigorously disputes the IAAF's contentions and offers several grounds for this Court to reject the IAAF's arguments. Slaney first argues that her claims do not constitute an appeal from the Tribunal's decision. Slaney next disputes whether the Convention applies to this matter, as this is not a commercial dispute and there was no agreement to arbitrate the claims at issue here. If the Court finds that the Convention does apply, Slaney argues that she is entitled to defenses set out by the Convention

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[7]Both the United States and Monaco are signatories of the United Nations Convention On Recognition and Enforcement Of Foreign Arbitral Awards, also known as the New York Convention.

which would necessitate the Court's refusal to recognize the award.

a) Application of the New York Convention

The first issue the Court must determine, then, is what the Tribunal actually decided. The April 25, 1999 Tribunal opinion begins by discussing the reasoning behind its controversial interlocutory ruling. It reiterates that the initial burden of proof is on the IAAF to show that the athlete has a T/E ratio greater than that normally found in humans. If the IAAF can do so, it has provided sufficient evidence for the sample to be deemed positive. The burden then shifts to the athlete to prove by clear and convincing evidence, defined as evidence conveying a high degree of probability and not mere assertions, that the high T/E ratio was due to pathological or physiological conditions. In reaching these conclusions, the Tribunal drew from the IAAF rules on testing for testosterone.

The Tribunal next considered whether or not Slaney committed a doping offense by using the two step process outlined above. It determined that the IAAF had proven that Slaney's specimen should be deemed positive, noting that both samples of the specimen registered over 6:1, Slaney's longitudinal study revealed a previous T/E ratio high of 3:1 and that the scientific evidence before it did not conclusively show that a T/E ratio over 6:1 was not consistent with normal endogenous production.

The Tribunal then discussed whether Slaney could show with a high degree of probability that her elevated T/E ratio was attributable to pathological or physiological

conditions. This inquiry was rather abbreviated, however, as the Tribunal noted that both Slaney and the USATF withdrew from the proceedings after the interlocutory ruling. However, using the evidence before it, evidence which did not include Slaney's medical records as she declined to produce them, the Tribunal found that Slaney had not met her burden of disproving the positive test result by clear and convincing evidence. Hence, the Tribunal set aside the USATF's Doping Hearing Board's decision and found Slaney guilty of a doping offense on June 17, 1996.

Slaney argues that the Tribunal decided only that her T/E ratio was greater than 6:1. However, as the preceding discussion indicates, the Tribunal decided much more than that. It validated the IAAF's interpretation of the rules for testing for testosterone, found that the 6:1 ratio was not invalid, and found Slaney's various defenses unpersuasive in light of the acknowledged lack of medical evidence.

The question then becomes whether allowing Slaney's current action would undermine or nullify the Tribunal's decision. Rudell v. Comprehensive Accounting Corp., 802 F.2d 926 (7th Cir. 1986). Based upon the discussion above and a review of Slaney's complaint, the Court finds that it would. As such, the viability of Slaney's claims against the IAAF depend upon her ability to demonstrate that the Convention does not apply or that the Convention's affirmative defenses bar recognition of the award.

i) The nature of the dispute

Both the IAAF and Slaney agree that the Convention only applies to commercial arbitrations. Slaney argues that

her dispute with the IAAF is not commercial in nature and therefore falls outside the Convention. However, the Court finds the IAAF's argument to the contrary more persuasive.

The Amateur Sports Act provides that all amateur sports organizations and athletes must agree to submit to binding arbitration conducted in accordance with the commercial rules of the American Arbitration Association. 36 U.S.C. § 391(b)(3) & 395(c)(1). Given Congress' decree that all domestic disputes regarding an amateur athlete's eligibility be treated as commercial disputes, the Court sees no reason to treat international disputes any differently. Slaney's arguments that her relationship with the IAAF is in no sense commercial miss the point. Congress has chosen to treat these types of relationships as commercial in the domestic arena, and Slaney has offered no reason why international disputes should be handled any differently. As such, the Court finds that the relationship between Slaney and the IAAF is commercial in nature.

ii) Agreement in writing

In addition to requiring a commercial dispute, the Convention also requires that there be an agreement in writing to arbitrate any differences between the parties. 9 U.S.C. § 201 note, Art. II, ¶ 1. An agreement in writing "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Id., Art. II, ¶ 2. These elements are not met, according to Slaney, because she has never signed any arbitral clause with the IAAF, the agreement is not reflected in any letters, telegrams, or facsimiles, nor do the

IAAF rules contemplate arbitration of the claims raised in this action.

Slaney candidly admits that she is subject to the rules and regulations of the IAAF through her membership in the USATF. However, she seeks to escape the IAAF's arbitration requirement by alleging that the IAAF did not contemplate the types of claims Slaney has lodged in this action. This would place Slaney's claims outside the arbitral subject matter, and allow her to proceed with her action. Unfortunately, the Court finds that the IAAF arbitration clause does cover Slaney's current claims. Rules 21(1) and (2) both use the phrase "all disputes," indicating that all disputes between member organizations or athletes and member organizations, regardless of their origin, shall be submitted to arbitration. *See* Affidavit of Mark E. Gay, Exh. 1. The rules make no exception for allegations of fraud, breach of contract, breach of fiduciary duty, etc., nor do the rules provide a separate procedure for challenging the validity of a testing method.

IAAF Rule 21(3) does provide for additional review of member organization decisions relating to doping offences in certain circumstances, a rule which the IAAF invoked in this case to review the USATF's decision to exonerate Slaney.[8] However, this rule merely expands the Tribunal's ability to review member decisions regarding doping offenses. The rules requiring all disputes to be arbitrated remain

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[8]Rule 21(3) (ii) provides for the Tribunal to review doping related disputes "Where a Member has held a hearing under Rule 59, and the IAAF believes that in the conduct or conclusions of such hearing the Member has misdirected itself, or otherwise reached an erroneous conclusion."

unchanged. Therefore, the Court finds that all disputes, including the claims raised by Slaney in this action, had to be submitted to arbitration under IAAF rules. As Slaney is admittedly bound by these written IAAF rules, there can be little doubt that the Convention's agreement in writing requirement is satisfied.

iii) Mutual duty to arbitrate

Slaney's next argument, that the IAAF rules give the IAAF exclusive authority to submit a dispute to arbitration, is also misplaced. The IAAF's requirement that all disputes be submitted to arbitration is not undermined by rules giving the IAAF Arbitration Panel discretionary review over certain claims. *See* IAAF Rule 21(5). This is because Rule 21(2) states that disputes between member organizations and athletes should be decided through arbitration with the member organization, not the IAAF. Consequently, each member organization like the USATF must arbitrate disputes between athletes and itself, and generally must arbitrate disputes between athletes and the IAAF unless the IAAF Council votes for the IAAF Arbitration Panel to arbitrate the dispute in the first instance. IAAF Rule 21(2). The mandate to arbitrate all disputes still remains, but is generally carried out by the IAAF's member organizations with the caveat the Tribunal may review the member organization's decision in limited circumstances. As both Slaney and the IAAF (through the USATF) must submit all disputes to arbitration, the arbitration requirement is not illusory. Further, as the rules contain a mutual obligation, they do not constitute a contract of adhesion.

iv) Duty to arbitrate under domestic rules

Slaney also claims that the USATF has never adopted the IAAF's requirement that all disputes between athletes and the IAAF be submitted to arbitration. However, Slaney has failed to provide the Court with the USATF by-laws, rules or regulations to support her statement. In addition, the USATF provides an indirect route to arbitration, as once an aggrieved athlete exhausts her administrative remedies with the USATF over matters such as eligibility, she may petition the USOC to address the matter. Should the athlete or USATF disagree with the USOC's determination, the Amateur Sports Act requires the matter to be submitted to arbitration. 36 U.S.C. § 395(c) (1). Therefore, any disputes not settled by the long administrative review process do end up in arbitration, thereby satisfying IAAF Rule 21(2).

v) Parties to the arbitration

As a final threshold matter, the Court must disagree with Slaney's assertion that she was not a party to the IAAF arbitration. To say her participation was merely voluntary and unnecessary is mistaken, a fact which is underscored by the Tribunal's candid acknowledgment that Slaney's testimony and medical evidence was highly relevant and would have had some weight with the Tribunal. As such, the Court finds that Slaney was an indispensable party to the IAAF arbitration.

b) Application of Convention defenses

The Convention provides various defenses which allow courts to refuse recognition and enforcement of foreign arbitral awards. *See* 9 U.S.C. § 201 note, Art. V. Slaney claims that three defenses apply in this case: (1) she was prevented from presenting her case to the Tribunal (Art. V(1)(b)); (2) the arbitration was not in accordance with the IAAF's own rules (Art. V(1)(d)); and (3) the arbitration was contrary to United States public policy (Art. V(2)(b)). Consequently, Slaney urges this Court to refuse recognition of the Tribunal's decision and allow Slaney to present her claims.[9]

i) Opportunity to present her case

Slaney states that her principal attack against the IAAF's position is that an elevated T/E ratio, by itself, is insufficient to prove beyond a reasonable doubt that a female athlete has committed a doping offense. However, the Tribunal, by adopting the IAAF's position that the IAAF rules required it only to prove that the T/E ratio as above 6:1, prevented her from making this argument. This, Slaney alleges, rendered her unable to present her case to the Tribunal.

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[9]The IAAF argues that this is merely an indirect attempt by Slaney to have a domestic court set aside a foreign arbitral award, precisely the result the Convention hoped to prevent. Because the Court finds the argued defenses inapplicable, it is unnecessary to address the IAAF's argument.

The Court must respectfully disagree with Slaney's position. The Tribunal heard and rejected her interpretation of the IAAF rules. In addition, the Tribunal, after considering scientific evidence, determined that a T/E ratio higher than 6:1 could be considered unnaturally elevated. These decisions, although adverse to Slaney's position, did not deprive her of an opportunity to be heard. Further, Slaney was afforded the opportunity to present her testimony and attempt to show that her elevated ratio was due to pathological or physiological conditions. Therefore, the Court must conclude that Slaney had an opportunity to present her case.

ii) Arbitration in accordance with IAAF rules

The Tribunal determined that the IAAF could carry its burden of proving, beyond a reasonable doubt, that Slaney had taken testosterone by showing that her T/E ratio was greater than 6:1. This determination was based on a reading of the IAAF rules regarding testosterone testing. The Court cannot now say that the Tribunal breached the IAAF's rules on testosterone testing when it explicitly determined what the rules meant and applied this interpretation to Slaney's case. This defense fails as well.

iii) Offense to public policy

The public policy defense is narrowly construed, Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975), and applies only where enforcement of the Convention would violate the "most basic notions of morality and justice," Id., or "explicit public policy that is well defined and dominant and is ascertained by reference to the laws and legal

precedents and not from general consideration of supposed public interests." Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1445 (11th Cir. 1998) (citations omitted). Slaney argues the IAAF arbitration was fundamentally unfair in that: (1) neither the IAAF arbitration process nor its arbitrators are independent; (2) the IAAF arbitrators are not neutral; and (3) the IAAF arbitral decisions are arbitrary. In addition, Slaney claims that the mandatory presumption of guilt, refusal to give the athlete notice of what prohibited substance is thought to be present, and shifting the burden of proof to the athlete to prove her innocence are fundamentally inconsistent with the United States' most basic notions of justice.

The Court feels that the IAAF arbitration process, though flawed, is not offensive to our most basic notions of morality and justice. This finding is underscored by Slaney's failure to cite any law or precedent in support of her invocation of the public policy defense. As a result, the Court finds that the narrow public policy defense does not apply here.

c. Summary

The IAAF makes it difficult for an athlete to exonerate herself from a doping charge. Further, even a successful defense of such a charge often cannot repair the damage caused to an athlete's reputation, a valuable commodity in today's endorsement-laden sports world. However, our review of the case indicates that whatever problems the Court may have with the IAAF's conduct and procedures in this case, the Tribunal's decision is valid and must be enforced.

It becomes irrelevant, then, that the Court feels personal jurisdiction would be proper in this case. This Court lacks subject matter jurisdiction over Slaney's claims against the IAAF, and dismisses all claims against it.

2. USOC's 12(b) (1) motion to dismiss

a) State law claims

The USOC argues that Slaney's failure to exhaust her administrative remedies deprives this Court of subject matter jurisdiction. This Court does lack subject matter jurisdiction, but not for the reason advanced by the USOC.[10]

Much like the Convention proved an insurmountable obstacle for Slaney's claims against the IAAF, the Amateur Sports Act presents a wall too high to hurdle for Slaney's claims against the USOC. The Amateur Sports Act gives the USOC the exclusive right to determine disputes over eligibility. 36 U.S.C. § 375(5). Slaney argues that her claims are not about eligibility, but relate to the fraudulent and deceitful administration and prosecution of the USOC's controversial T/E ratio test. However, the USOC uses this test to determine eligibility for international competition, a decision which lies within its exclusive jurisdiction. As such, despite Slaney's arguments to the contrary, this case is

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[10]The USOC's moving brief mentions lack of subject matter jurisdiction as grounds for dismissing the claims against it. Oddly enough, only its reply brief argues the merits of this defense. Regardless of where USOC presents its arguments, the issue of subject matter jurisdiction is not waivable and must be considered.

essentially about how the USOC determines eligibility for female athletes.

As the Seventh Circuit has clearly stated, the Amateur Sports Act does not offer a private cause of action. United States Olympic Comm., 741 F.2d 155, 157 (7th Cir. 1984). Judge Posner, concurring in the decision, opined that "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games." Id. at 159. This principle has been adopted by most other courts, both state and federal, which have addressed eligibility disputes. Behagen v. Amateur Basketball Ass'n of the U.S., 884 F.2d 524 (10th Cir. 1989); Martinez v. United States Olympic Comm., 802 F.2d 1275 (10th Cir. 1986); Oldfield v. The Athletic Congress of the U.S.A., 779 F.2d 505 (9th Cir. 1985) Barnes v. International Amateur Athletic Fed'n, 862 F. Supp. 1537 (S.D.W. Va. 1993); Walton-Floyd v. United States Olympic Comm., 965 S.W.2d 35 (Tex. App. 1998); Cantrell v. United States Soccer Fed'n, 924 P.2d 789 (Okla. Ct. App. 1996); Dolan v. United States Equestrian Team. Inc., 608 A.2d 434 (N.J. Super. Ct. App. Div. 1992).

The two cases cited by Slaney to defeat this line of jurisprudence are inapplicable. Slaney points out that a federal court allowed an athlete to bring breach of contract claims against an organization in Harding v. United States Figure Skating Ass'n, 851 F. Supp. 1476 (D. Or. 1994); therefore, her breach of contract claims should stand. It is true that the Harding court allowed intervention into an athletic association's disciplinary proceedings, but the court cautioned that such action was only warranted when "the association has clearly breached its own rules, that breach will imminently

result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies." Id. at 1479. These factors are not present here as there is no imminent danger --Slaney's suspension has already expired.

Two additional factors militate against adopting the rule of law expressed in Harding. First, the district court warned that a reviewing court should not intervene in the merits of the underlying dispute. Id. Here, the underlying dispute is the validity of the T/E ratio test used in testing for testosterone. Any action by the Court would require consideration of whether this test is valid or is actually a fraudulent attempt by the USOC to cover up its inability to accurately test for testosterone. Hence, we would be doing precisely what the Harding court deemed inappropriate. Second, the issue decided in Harding dealt not with eligibility but whether a hearing set for the athlete was indeed reasonably convenient for all parties. Slaney asks this Court to pass judgment on far more and invalidate a test used to determine compliance with anti-doping rules followed worldwide. Consequently, the Court finds ~ inapplicable to the case at bar.

Slaney's reliance on Foschi v. United States Swimming, Inc., 916 F. Supp. 232 (E.D.N.Y. 1996) also fails to advance her cause. Foschi merely confirmed that the Amateur Sports Act does not completely preempt state law claims. Id. at 241. The issue here, however, is not complete preemption but whether the Amateur Sport Act's grant of exclusive jurisdiction to determine eligibility for competition preempts Slaney's state law claims against the USOC. Considering the large amount of case law which says it does, the Court finds that Slaney's claims are preempted as they

would stand as an obstacle to the accomplishment of Congress' objective in passing the Amateur Sports Act. *See* Brown v. Kerr-McGee Chem. Corp., 767 F.2d 1234, 1240 (7th Cir. 1985) (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 78 L. Ed. 2d 443 (1984)).

Finally, there is the question of what the USOC could have done to aid Slaney. Had the USOC or the USATF taken some adverse action against Slaney she could have petitioned the USOC to take action, action which may have ultimately led to binding arbitration. The problem here is that neither the USATF nor the USOC caused Slaney any harm. It was the actions of the autonomous IAAF that suspended Slaney and ultimately found her guilty of the doping offense, and as Judge Posner noted in Michels, an international federation "can thumb its collective nose at the U.S. Olympic Committee." Id., 741 F.2d at 159 (Posner, J. concurring). Slaney's real dispute is with the IAAF, not the USOC, as the USOC was powerless to act on her behalf.

b) Federal claim

The Tribunal's decision effectively removed subject matter jurisdiction over Slaney's claims against the IAAF. However, no such bar exists for Slaney's RICO claim against the USOC. As such, this Court has federal question jurisdiction over Slaney's RICO claim pursuant to 18 U.S.C. § 1964(c).

B. USOC's 12(b)(6) Motion to Dismiss

A RICO claim consist of four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering

activity. 18 U.S.C. § 1962(c); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 358-59 (1985); Goren v. New Vision Int'l, Inc., 156 F.3d 721, 727 (7th Cir. 1998). If, taking all the allegations contained in Slaney's complaint as true and drawing all reasonable inferences in her favor, Slaney can prove any set of facts to support her RICO claim which would entitle her to relief, the USOC's motion must be denied. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 84 (1957); Fredrick v. Simmons Airlines, Inc., 144 F.3d 500, 502 (7th Cir. 1998).

Congress authored the RICO statute with broad language, partly to prevent ingenious lawyers from drilling loopholes through it. Fitzgerald v. Chrysler Corp., 116 F.3d 225, 226 (7th Cir. 1997). However, these broad strokes have attracted the eye of many an attorney, causing allegations of RICO violations to appear in situations "absurdly remote" from those envisioned by Congress when it enacted the RICO statute. Id. To combat this trend the Seventh Circuit has adopted a family resemblance test which compares a claim with the prototypical RICO case to see if there is at least some resemblance between the two. Id. at 227.

The paradigmatic RICO case is:

> one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm's resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts than he could do in his own person, that is, without channeling his criminal

> activities through the enterprise that he has taken over.

Id. (citations omitted). The case here is vastly different. According to the complaint, the USOC (the person) is the domestic representative or agent of the IOC and is responsible for carrying out the mission of the IOC and the Olympic Movement (the enterprise). Complaint, ¶ 8. The USOC is subject to the IOC's drug testing program. Id., at ¶ 14. Further, the USOC is a member of the Olympic Movement. Id. at ¶ 16. Finally, the Olympic Movement is subject to the supreme authority of the IOC. Id. As this hierarchical relationship demonstrates, the USOC has little if any control over the enterprise. Instead, the IOC has supreme authority over the enterprise and to a large extent controls the USOC because the USOC must follow IOC rules and regulations. This is clearly not the type of situation RICO was intended to cover. As Slaney's claim is far afield of the prototypical RICO claim, the Court dismisses her RICO claim based on 18 U.S.C. § 1962(c).

Although not mentioned by either party, the Court must also inquire whether Slaney's complaint sufficiently alleges a claim under the RICO conspiracy provision, codified at 18 U.S.C. § 1962(d). Slaney's claim failed under § 1962(c) in large part because the USOC had no control or management over the Olympic Movement. Section 1962(d), on the other hand, does not require the defendant to operate or manage the enterprise. Goren, 156 F.3d at 731 (citing Reves v. Ernst & Young, 507 U.S. 170, 122 L. Ed. 2d 525 (1993)). The conspiracy provision offers a different test, centering not on control but on agreements to participates in RICO violations. As such, Slaney may state a viable claim

under § 1962(d) if she alleges: (1) that the USOC agreed to maintain an interest in or control of the Olympic Movement or to participate in the affairs of the Olympic Movement through a pattern of racketeering activity and (2) that the USOC further agreed that someone would commit at least two predicate acts to accomplish those goals. Id. at 732 (citations omitted).

Unfortunately for Slaney, her complaint fails to allege that the USOC agreed to violate RICO. Throughout the proceedings the USOC consistently maintained that the USATF had to follow the USOC's rules and periodically requested reports from the USATF and the IAAF after it began to investigate the matter. It was not until Slaney filed her complaint with the USOC that it became aware that the IAAF had not conducted the required investigation. Complaint, ¶ 68. After this point, Slaney complains that the USOC did not intervene on her behalf, either at the USATF hearings or at the IAAF arbitration. The USOC declined, not because of any alleged agreement but on the premise that there was nothing it could do to stop the IAAF's conduct. Id. at ¶ 99. None of these allegations indicate an agreement to commit any RICO violations.

The closest Slaney comes to alleging any type of agreement is when she claims the USOC ordered the UCLA laboratory not to provide Slaney with any more analyses information. Id. at ¶ 69. However, there is no allegation that this decision to block Slaney's information requests was motivated by an agreement to participate in the fraudulent affairs of the Olympic Movement or an agreement to commit two specific predicate acts. Consequently, the Court finds that Slaney's complaint fails to allege a violation of 18 U.S.C.

§ 1962(d).

III. CONCLUSION

The Court sympathizes with Slaney's plight and realizes dismissal of this action basically closes the last avenue Slaney had to challenge the IAAF's decision. However, as this Entry and many of the cases cited herein indicate, this avenue was bound to lead to a dead end. Slaney's claims against the IAAF are barred by the Convention, for to entertain her arguments would severely undermine the Tribunal's determination. Her claims against the USOC fare no better, as her state law claims are preempted by the Amateur Sports Act, and the Amateur Sports Act allows no private cause of action. Further, Slaney's federal claim against the USOC does not come close to fitting the family of claims Congress intended the RICO statute to cover. As such, Slaney's allegations under 18 U.S.C. § 1962(c) must fail. Slaney's complaint also fails to adequately allege a violation of the RICO conspiracy provision, and hence does not state a claim under 18 U.S.C. § 1962(d).

In conclusion, the Court dismisses all Slaney's claims against the IAAF pursuant to Rule 12(b) (1) for lack of subject matter jurisdiction. The state law claims against the USOC are also dismissed pursuant to Rule 12(b) (1). Finally, Slaney's RICO claim against the USOC is dismissed under Rule 12(b) (6) for failure to state a claim upon which relief may be granted.

Dated this 5th day of November, 1999.

/s/_____
S. Hugh Dillin
United States District Judge

APPENDIX C

IAAF ARBITRATORS' DECISION

[Dated April 25, 1999]

IN THE MATTER OF AN ARBITRATION INITIATED BY THE INTERNATIONAL AMATEUR ATHLETIC FEDERATION "IAAF", USA TRACK AND FIELD INC. "USATF" RESPONDENT, HAS HELD A HEARING UNDER IAAF RULE 59 "DISCIPLINARY PROCEDURES FOR DOPING OFFENCES" AND THE IAAF BELIEVES THAT IN THE CONDUCT OR CONCLUSIONS OF SUCH HEARING USATF HAS MISDIRECTED ITSELF OR OTHERWISE REACHED AN ERRONEOUS CONCLUSION

WHEREAS:

1. A dispute between a Member and the Council of IAAF may be submitted to the Arbitration Panel in a matter where a Member has held a hearing under Rule 59 in a doping offence and the IAAF believes that in the conduct or conclusions of such hearing, the Member has misdirected itself or otherwise reached an erroneous conclusion (Rule 21 para.3(ii));

2. USATF is a Member of the IAAF and it has held the above-mentioned hearing in the Ms. Decker Slaney case and the IAAF Rules are the appropriate rules to be applied in this case when a doping test has been undertaken;

3. By a letter 17 January 1998, the IAAF Council referred to the Arbitration Panel the matter of the decision of USATF dated 17 October 1997 to exonerate Ms. Decker Slaney of a doping offence because (a) no prohibited substance was found to be present in the body tissue or fluids of the athlete and (b) the IAAF definition relating criteria for establishing when a testosterone to epitestosterone ration positive has occurred;

NOW WE, C. VEDDER, CHAIRMAN, R.J. ELLICOTT, AND LIN KOK LOH, being the Arbitrators appointed from the Panel elected pursuant to the IAAF Rules having taken note of the said Referral dated 17 January 1998, the Statement of the IAAF in support of its Referral dated 17 January 1998, the Response by USATF and Ms. Decker Slaney dated 2 September 1998 and the IAAF's reply dated 18 September 1998 and having read and considered the documents and heard the expert witnesses hereinafter referred to, having sat on 3 August 1998, 29-31 January 1999 and 24 April 1999 and having heard the various submissions on each occasion of the hearings made by Counsel on behalf of the IAAF, USATF, and Ms. Decker Slaney, namely:

Mr. Michael Belhoff OC assisted by Mr. Mark Gay
Appeared for IAAF

Mr. Craig Masback
Appeared for USATF

Mr. James E. Coleman, Jr.
Appeared for Ms. Decker Slaney

DO HEREBY MAKE AND PUBLISH THIS DECISION:

1. On 17 June 1996, Ms. Decker Slaney ("the athlete") competed in the 5000m event at the USATF Olympic Trials held in Atlanta, Georgia. After her competition she submitted a urine sample pursuant to the United States Olympic Committee's National Anti-Doping Progamme. The athlete completed the required Doping Control Form on which she disclosed the medication she had taken.

2. Her sample was sen to the IOC accredited laboratory in Montreal. Upon analysis, the "A" sample was found to display a testosterone/epitestosterone ("T/E") ration of approximately 9.5:1. The "B" sample was analysed at the request of the athlete on 16 July 1996 and it ratio was found to be 11.6:1.

3. Further investigations were conducted which involved the review of analyses of urine samples previously given by the athlete and analyses of samples given subsequent to the date of the "A" and "B" sample.

4. On 5 February 1997, Dr. Dolle of the IAAF informed the USATF as follows:

> " . . . a thorough investigation on previous and subsequent test results for additional test data has been conducted over the last few months.
>
> This collection of data has been carefully summarised ans submitted as the IAAF Doping Commission. They consider that the finding

of the T/E ration of 11.6 ans an increased testosterone concentration in the above sample is not consistent with the normal endogenous production in comparison to the other data collected on the athlete.

Therefore, the sample should be deemed to be positive for testosterone, according to the IAAF prohibited substances list, in the IAAF Procedural Guidelines for Doping Control, schedule 1, part I."

5. On 13-14 September 1997, a hearing took place in Chicago before the Doping Hearing Board of USATF which led to the decision to exonerate the athlete. The written opinion was given on 17 October 1997.

6. In response to USATF's motion to reject the referral fo the dispute to arbitration, the Arbitration Panel, after the first hearing which took place in Monaco on 3 August 1998, held that it had jurisdiction by virtue of Rule 21 para. 1 subpara. 2.

7. The hearing was to resume on 28-30 November 1998, as agreed between the parties at the August hearing and fixed by order of the Chairman on 12 October 1998. However, on request of USATF dated 5 November 1998, the hearing was adjourned and by order of the Chairman on 19 November 1998 fixed to take place on 29-31 January 1999.

8. During the hearing, on 30 January 1999, Dr. Richard V. Clark, one of the expert witnesses called by

USATF and the athlete, stated that he had reviewed her medical records. IAAF asked for the medical records to be produced to them and to the Panel as indeed IAAF had already previously requested. The Counsel for the athlete was unable to produce the medical records owing to lack of instructions from his client. This led the Arbitration Panel to suspend the hearing for deliberation after which it published the following order:

> "1. If the witness, Dr. Richard Clark is to give evidence on the basis of Ms. Decker-Slaney's medical records, these records must be produced before the witness continues his evidence. The witness must give his evidence by express reference to these records.
>
> 2. Copies of the medical records must be provided to IAAF and the Arbitration Panel. The confidentiality of the records is protected by the confidentiality of the proceedings.
>
> 3. The Arbitration Panel would sympathetically consider any application by IAAF for time arising from the late production of the medical records."

Then, Counsel for the athlete declared that he would like to produce the records but he had to be instructed by his client first and in order to enable him to speak

to his client, he would need to know what exactly the burden of proof would be. He expressly applied for an interlocutory ruling on the burden of proof. IAAF did not object. The next morning's hearing was fixed for submissions on this specific aspect.

9. When the hearing resumed on 31 January, Counsel for the athlete declared that he could not contact his client and therefore neither the medical records could be produced nor could the athlete attend to testify. After having heard the submissions of all the parties, the Arbitration Panel issued the following order:

> "1. On the application made by USATF for an interlocutory ruling, the Arbitration Panel rules:
>
> - that on the true construction of the IAAF Rules which govern these proceedings the athlete in this case having been found to have the prohibited substance testosterone whin her body fluids will have committed a doping offense.
>
> - if the IAAF establishes beyond reasonable doubt that either the T/E ratio in the athlete's urine or the concentration of testosterone in her urine so exceeds the values normally found in humans as not to be consistent with normal endogenous production

- unless the athlete on her part proves by clear and convincing evidence the that that abnormal ratio or concentration if so proved is attributable to a pathological or physiological condition.

It is implicit in the ruling that the IAAF Rules in question are not vague and inconsistent as found by the Doping Hearing Board of USATF.

2. The hearing is adjourned. The next hearing will take place in Monaco on April 24, 25 and, if necessary 26. It is understood that the Arbitration Panel will then decided the case on the available evidence.

3. The medical records to be relied upon are to be produced to IAAF on or before 8 February 1999."

10. The hearing was adjourned until 24 April on the specific understanding that the medical records were to be produced to IAAF for an endocrinologist's study.

11. On or about 12 April 1999, the athlete filed a lawsuit against the IAAF and USOC before the United States district Court, Southern District of Indiana, Indianapolis Division. On 14 April, by letter to the Chairman, received on 15 April, USATF made an application to adjourn the hearing until this lawsuit is

resolved. IAAF opposed that application. The Arbitration Panel considered the application for adjournment by correspondence and decided by order of 16 April that the continued hearing would proceed as scheduled and the application for adjournment would have to be made at the time of the hearing.

12. On the eve of the hearing, USATF issued a Press Release to the effect that USATF ans the athlete "have decided not to participate further in the arbitration concerning the athlete currently being conducted in Monaco." The Press Release went on to state that "the decision to withdraw from participation in the IAAF arbitration" was "precipitated" by the interlocutory ruling of 31 January 1999, described as an "extraordinary decision."

13. At the continued hearing on 24 April, neither USATF nor the athlete were represented. IAAF has sent earlier a draft of their final submissions to USATF and had invited them to give a written reply to the Arbitration Panel. USATF did not respond.

14. The Application for adjournment was then consider on its merits. However, it was dismissed primarily for the following reasons. The arbitration proceedings under IAAF Rules cannot be made dependent on the outcome of a lawsuit before a domestic court. The arbitration proceedings had reached a very advanced stage and it would be unfair and contrary to the principles of procedural justice to adjourn it for the convenience of a party who in fact has an adverse order against it ans has had every opportunity afforded

to it to be present. USATF and the athlete, after having promulgated the decision to withdraw from the arbitration proceedings were not expected to give any further evidence or submissions.

15. The hearing then proceeded as determined by the interlocutory ruling of 31 January. As no further evidence had been given or called and no further submission had been made on behalf of USATF and the athlete, we then proceeded to hear the final submissions on behalf of IAAF. The Panel was then left with the task of evaluating the evidence available before it. The Arbitration Panel accordingly considered all available evidence reminding itself in the process that it should give the fullest consideration towards the interest of the absent parties.

16. We had the benefit of written and oral submissions form each of the parties during the hearing from 29-31 January 1999. There was also provided to us two volumes containing the evidence before the Doping Hearing Board of USATF ("Transcript").

* * * * *

[page 5]

THE REASONS FOR THE INTERLOCUTORY RULING OF 31 JANUARY 1999

17. As stated earlier, on 31 January 1999, in response to the application of both USATF and the athlete, we made the order no. 1 of the interlocutory ruling set out

in paragraph 9 above. We did not on that occasion give reasons for the views we then expressed. WE summarise them below.

18. It is important at the outset to not that an offence of doping is committed when a prohibited substance is found to be present in an athlete's body tissue or fluids (Rule 55 para. 2(i)) and that according to Rule 55 para. 3 "prohibited substances" include those listed in Schedule 1 of the "Procedural Guidelines for Doping Control".

19. Schedule 1 to the Guidelines includes in Part I(a)(i) "testosterone" as a prohibited substance. Of course if it stopped here, no athlete could compete because all humans has testosterone in their body tissue or fluids. It was therefore necessary to limit the circumstances in which the presence of testosterone would constitute a doping offence. The schedule therefore contains the following notes in relation to testosterone:

> "Testosterone: a sample will be deemed to be positive for testosterone where either the ratio in urine of testosterone to epitestosterone, or the concentration of testosterone in urine, so exceeds the range of values normally found in humans as not to be consistent with normal endogenous production.
>
> A sample will not be regarded as positive for dehydrotestosterone or testosterone where an athlete proves by clear and convincing evidence that the abnormal ratio or

concentration is attributable to a pathological or physiological condition."

20. Pursuant to Rule 59 para. 5 at a hearing, the IAAF has the burden of proving beyond reasonable doubt that a doping offence has been committed.

21. The first of the two paragraphs (set out in paragraph 19 above) states that a sample will be "deemed to be positive" in the circumstances therein stated. We interpret this to mean that an offence will be committed if those circumstances exist. One of them is where the ratio of testosterone to epitestosterone in urine so exceeds the range of values normally found in humans as not to be consistent with normal endogenous production. It is these circumstances that are relevant to this case.

22. Having regard to the requirement that the IAAF must prove beyond reasonable doubt that a doping offence has been committed, it follows that if the IAAF proves beyond reasonable doubt that those circumstances exist in a given case, an offence will be deemed to have been committed.

23. This however, is subject to the second paragraph (set out in paragraph 19 above) which indicates circumstances in which a sample will not be regarded as positive, namely where an athlete proves by clear and convincing evidence that the abnormal ratio is attributable to a pathological or physiological condition.

24. In our opinion, the effect of this second paragraph is that if the IAAF establishes beyond reasonable doubt that an abnormal ratio exists in the athlete's body tissue or fluids, the athlete will be able to avoid a finding of guilt if he or she can prove by clear and convincing evidence that the abnormal ratio is so attributable.

25. It was submitted by USATF and the athlete that IAAF must prove beyond reasonable doubt not only that the ratio was abnormal but also that it was not due to a pathological or physiological condition of the athlete.

26. In our opinion, it is not possible to give this construction to the Rules and Guidelines, having regard to the clear works of the paragraphs in questions. They make a clear distinction between what that athlete must prove if he or she is not to be found guilty of an offence. The latter proof must be clear and convincing, i.e., it must convey a high degree of probability and not mere assertions.

27. The second paragraph would have no purpose if USATF's and the athlete's submission were accepted. Further, it would mean that the first paragraph although clearly limiting what the IAAF must prove did not really mean this. The reason for changing the onus of proof on the two issues is in our view clear. The paragraphs were intended to define the point where the I/E ratio would be deemed to be an offence, that is where it would be abnormal, while enabling the athlete to avoid a finding of guilt by adducing clear and convincing evidence of matters which would be

much more likely to be in the athlete's special knowledge, namely the presence of a pathological or physiological condition. So construed, the composite effect of the paragraphs are not in our opinion unfair.

28. It was found by the Doping Hearing Board of USATF that the IAAF's definition of when a testosterone related doping offence has occurred is "vague and inconsistent". It will be appreciated from what we have said above that we do not agree for the reasons we have stated. The Guidelines establish relevant matters of fact for proof by IAAF and the athlete respectively. The phrase "the range of values normally found in humans" is not in itself uncertain and is a matter for the relevant tribunal to consider in the light of evidence before it. Likewise, the phrase "attributable to a pathological or physiological condition."

29. Whatever debate there may be among scientists on these matters, the provisions themselves are sufficiently clear as to allow any tribunal to know the issues about which it must make findings and to identify the party who has the relevant means to establish them.

WHETHER A DOPING OFFENCE WAS COMMITTED

30. In considering this matter, the first question to answer having regard to our construction of the Rules and Guidelines is whether IAAF has established beyond reasonable doubt that the urine sample taken from the athlete so exceeded the range of values normally

found in humans as not to be consistent with normal endogenous production.

31. The IAAF's case is that the athlete's T/E ratio was in a range of 9.5:1 to 11.6:1. The analyses of both the "A" or "B" samples are contained in the Core Bundle tabes 6A and 6B. In one of the submission on behalf of the athlete, it was said that she did not contest that her T/E ratio was above 6:1 (see the athlete's Motion to Dismiss of 27 January 1999, p. 9). In our opinion the documentation and explanation thereof given in written testimony established that the athlete's sample of urine given on 17 June 1996 on analysis showed that her T/E ratio at that time fell between 9.5:1 and 11.6:1. This we find has been established beyond reasonable doubt. We do not regard the difference between the ratios on the "A" and "B" samples as casting any doubt on this.

32. The next question is whether a ratio of 9.5:1 and 11.6:1 so exceeds the range of values normally found in humans as not to be consistent with normal endogenous production.

33. Considerable evidence including expert opinions were given on this matter. On careful scrutiny of them, we are satisfied on the evidence that the athlete's T/E ratio on 17 June 1996 according to the samples analysed did exceed the range of values normally found in humans ans so exceeded it as not to be consistent with normal endogenous production.

34. Part of the evidence which we accept is that summarised in a table found in an article by Dr. Ayotte entitled "Evaluation of Elevated Testosterone /Epitestosterone values in athletes' urine samples" (Medical and Legal Authorities, Tab 3). This shows that in many thousands of tests of athletes, very few has ratios higher than 6:1. We are satisfied that this and other evidence before us established beyond reasonable doubt that a ratio of 6:1 at the time the sample was taken was in excess of the range of values normally found in humans. Although the tests in question were taken on athletes, nothing before us leads us to think that this is not a ratio that would apply to humans generally.

35. We are also satisfied beyond reasonable doubt on the evidence before us that, if an athlete is found to have a T/E ratio significantly in excess of 6:1, that ratio would not be consistent with normal endogenous production. In the case before us the ratio as we have found fell between 9.5:1 and 11.6:1 and we have no doubt that such a ratio so exceeded the range of values normally found in humans as not to be consistent with normal endogenous production. In considering this matter, we have also taken into account inter alia the opinion of Professor Donald A. Berry of Duke University. We have also considered the article "Stability of Steroid Profiles: The Circadian Rhythm of Urinary Ratios and Excretion Rates of Endogenous Steroids in Females and its Menstrual Dependency" (Medical and Legal Authorities, Tab 2). Against the background of the studies mentioned in paragraph 34 above, which considered thousands of samples we

accepted IAAF's submission that having regard to the limits of this study, it is statistically unreliable and does not provide a firm or sensible basis upon which to conclude that the athlete's results of 17 June 1996 were within the values normally found in humans.

36. It has been suggested that the reference to what is "normally found in humans" would exclude an athlete who fell into an exceptional category of humans whose normal endogenous production produces a T/E ratio above the normal range. We do not think that this is the correct construction of the phrase. We would point out that there would be no doubt on the evidence before us that the athlete's normal T/E ratio fell well below what we would regard on the evidence as the upper limit of the T/E ratio, namely 6:1. We refer to Core Bundle Tab 7 which contains a table ("Janvier 1999") setting out her T/E ratios resulting from tests before and after 17 June 1996. Generally the ratios of these samples taken between February 1993 and April 1998 in this longitudinal study, ranged from 0.6:1 to 1.9:1. Only one sample taken in May 1996 show a T/E/ of 3.0:1.

37. The findings we have made as to the T/E ratios revealed by the "A" and "B" samples mean that unless she could establish by clear and convincing evidence that these abnormal ratios were attributable to a pathological or physiological condition, the athlete is guilty of a doping offence.

WHETHER THE ATHLETE DISCHARGED THE BURDEN OF PROOF

38. We no propose to consider whether the athlete has so proved.

39. Having regard to the evidence and the submissions, it is not clear to us whether it is conceded by USATF and the athlete that she is not able to establish by clear and convincing evidence that her abnormal ratio on 17 June 1996 was not so attributable.

40. The need for her to appear personally before us was impressed by us on her Counsel at the hearing. This would have enabled her to deny that she had ingested the substance or to support contentions which might satisfy us of her having a pathological or physiological condition which could have resulted in those ratios. She did not appear for cross-examination. Her denial obviously could have had some weight with us but we did not have the benefit of it. What we had before us were mere assertions, not supported by medical evidence. The importance and significance of the production of her medical records was also emphasised by us to the Counsel of both the athlete and USATF. However, the medical records as pointed out elsewhere, were not produced, which, aided by expert testimony, might have satisfied us with sufficient clarity and conviction that the abnormal ratios were attributable to a pathological or physiological condition.

41. We have nonetheless given consideration to a number of matter which, in a given case, might provide such evidence, namely:

- bacteriological degradation
- age
- menstrual cycle
- alcohol
- birth control.

On none of these matters is there before us, in our opinion, clear and convincing evidence that the athlete's abnormal ratio was attributable to any of these causes. The evidence on them is either non-existent or unconvincing.

42. For instance, there is no evidence before us of bacteriological degradation.

43. The evidence as to the effect of age is conflicting. Indeed, the evidence of her own ratios would suggest that they decreased with age (Longitudinal Study, "Janvier 1999").

44. The evidence as to the effect of her menstrual cycle was indeed incomplete and inadequate for us to form any conclusion in her favor. She declined to produce her medical records. The scientific evidence as to the effect of the menstrual cycle on T/E/ ratio is minimal. Where it exists, it tends the other way (Medical ans Legal Authorities, Tab 2, Donike, p. 137).

45. The athlete apparently consumed half a bottle of red wine 24 hours before the test. The evidence with regard to the effect of alcohol is to say the least inconclusive. Insofar as the continuing effect of consumption is concerned, the evidence would suggest

that it was unlikely to have had such an effect in this case, namely 24 hours after consumption.

46. The remaining issue was birth control. Mr Kammerer provided a statement in support but he was not called for cross-examination. The only study on the matter to which our attention was drawn does not, in our opinion, support a conclusion that the abnormal T/E/ ratio could have been attributable to birth control (see "Stability of Steroid Profiles - The Influences of Oral Contraceptives on Steroid Profiles" by Marek Engelke, Medical and Legal Authorities, Tab 7, ans comments by Prof. Ayotte, Medical and Legal Authorities, Tab 3, p. 91).

47. It follows from the above that in our opinion, the athlete has failed to establish by clear and convincing evidence that her abnormal T/E/ ratio on 17 June 1996 was attributable to pathological or physiological conditions.

CONCLUSION

48. We therefore conclude that the athlete was guilty of a doping offence on 17 June 1996 and that the USATF's Doping Hearing Board decision fo 16 September 1997 was erroneous. Accordingly, the athlete became ineligible to compete for a minimum of two years from 17 June 1996. In fact, during that period which expired on 16 June 1998, she was only treated as ineligible from 6 June 1997 when the IAAF intervened pursuant to Rule 59 para. 2, to 16 September 1997

when the Doping Hearing Board of USATF gave its decision to exonerate the athlete.

DECISION

We therefore decide:

1. According to Rule 60 para. 2 (a)(i), an athlete who commits a first doping offence, is ineligible for a minimum of two years from the date of the provision of the sample. According to the wording of that rule, read in conjunction with Rule 59 para. 4 and Rule 60 para. 4, Ms. Mary Decker-Slaney was therefore ineligible and we hereby do so declare until 16 June 1998 and further she shall not be entitled to any award or addition to her trust fund to which she would have been entitled by virtue of her appearance an/or performance at the athletics meeting at which the doping offence took place or any other athletics meeting during her period of ineligibility.

2. Each party will bear their own costs. The Arbitrators' costs and disbursements are to be borne by IAAF.

Monte Carlo, 25 April 1999

/s/_____
Christopher Vedder

/s/_____
Robert J. Ellicott

/s/_____
Lin Kok Loh

APPENDIX D

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS[1]

* * * * *

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the

[1]New York, June 10, 1958, 21 U. S. T. 2517. The Convention was ratified by both the United States and Monaco. The Convention is in a note reprinted after 9 U.S.C. § 201.

parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

* * * * *

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the

decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

* * * * *

APPENDIX E

INTERNATIONAL AMATEUR ATHLETIC FEDERATION RULES

RULES 21, 55, and 59; Schedule 1, Part I

RULE 21
Disputes

General Disputes

1. All disputes between Members, or between a Member and the Council or Congress, however arising, shall be submitted to the Arbitration Panel for determination within three months of the date upon which the disputed decision was made.

   Disputes referred after this point may be accepted by the Arbitrators where the Arbitrators consider it to be fair and reasonable so to do.

2. Each Member shall incorporate in its constitution provision that all disputes between that Member and an athlete, or between an athlete and the IAAF, shall be submitted to arbitration. In the case of a dispute between a Member and an athlete, this dispute should be submitted to an arbitration panel constituted by the Member. In the case of a dispute between an athlete and the IAAF, this dispute may, at the option of the Council, be submitted to the IAAF's Arbitration Panel.

3. The following further matters may be submitted to the Arbitration Panel:

Doping Related Disputes

(i) Where testing has indicated the presence of a prohibited substance, or there is evidence of the use of a prohibited technique, and the athlete concerned considers that, despite tho finding of the Member's disciplinary tribunal, doping control was carried out in material breach of Rules 55 to 61 and relevant procedural guidelines.

(ii) Where a Member has held a hearing under Rule 59, and the IAAF believes that in the conduct or conclusions of such hearing the Member has misdirected itself, or otherwise reached an erroneous conclusion.

(iii) Where testing has indicated the presence of a prohibited substance and, contrary to Rule 59.3, the Member refuses to allow the athlete a hearing.

(iv) Where testing by another sporting body has indicated the presence of a prohibited substance, and the athlete considers that the decision of the other sporting body is unsatisfactory and should not be relied upon.

(v) Where an athlete has been found by the IAAF or a Member to have committed a doping offence (other than those listed in Rule 60.1*(i)* and *(ii))* and the athlete believes that the IAAF or the Member concerned have misdirected themselves or otherwise reached an erroneous conclusion.

(vi) Where an athlete has been found by the IAAF to have admitted taking a prohibited substance,

or using a prohibited technique, and tho athlete denies having made any such admission.

Non-Doping Related Disputes

(vii) Where an athlete has become ineligible under Rule 53, other than under Rule 53*(v)*, and wishes to contest such findings of ineligibility.

4. The decision of the Arbitration panel will be final and binding on all parties, and on all Members of the IAAF, and no right of appeal will lie from the Arbitration Panel's decision.

Where the Council has recognised the decision of a Member in accordance with Rules 54 and 61, no reference shall be made to the Arbitration Panel under these Rules.

5. A reference shall not be accepted by the Arbitration Panel until:

(i) all remedies have been exhausted under the Member's constitution, and

(ii) the Council or, in an emergency, the President acting in consultation with the General Secretary, have certified that special circumstances exist in justifying an arbitration.

* * * * *

RULE 55
Doping

1. Doping is strictly forbidden and is an offence under I.A.A.F. Rules.

2. The offence of doping takes place when either:

(i) a prohibited substance is found to be present within an athlete's body tissue or fluids; or

(ii) an athlete uses or takes advantage of a prohibited technique; or

(iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique. (*See also Rule 56.*)

3. Prohibited substances include those listed in Schedule 1 to the "Procedural Guidelines for Doping Control". This list shall be constantly reviewed by the Doping Commission and may added to or amended by them. Such addition or amendment must be approved by the Council, and shall come into force three months from the date of such approval.

4. It is an athlete's duty to ensure that no substance enters his body tissues or fluids which is prohibited under these Rules. Athletes are warned that they are responsible for all or any substance detected in samples given by them.

5. An athlete may request the Doping Commission to grant prior exemption allowing him to take a substance normally prohibited under IAAF Rules. Such an exemption will only be granted in cases of clear and compelling clinical need. Details of the procedure for such an application are to be found in the "Procedural Guidelines for Doping Control".

6. The expression "prohibited substance" shall include a metabolite of a prohibited substance.

7. The expression "prohibited technique" shall include:

(a) blood doping;

(b) use of substances and methods which alter the integrity and validity of urine samples used in doping control.

However, a fuller, non exhaustive, list of such techniques is to be found in Schedule 2 of the

"Procedural Guidelines for Doping Control". *(See also Rule 60.2 "Sanctions".)*

8. An admission may be made either orally in a verifiable manner or in writing. For the purpose of these Rules, a statement is not to be regarded as an admission where it was made more than six years after the facts to which it relates.

9. A Doping Commission shall be appointed by the Council on the recommendation of the Medical Committee. It shall report to the Council and Medical Committee with whom it shall consult when necessary. Its function shall be to advise the I.A.A.F. on all matters relating to doping generally, as well as specific matters outlined in these Rules. It shall consist of up to 5 members who shall meet or consult regularly on an informal basis.

10. Procedural and administrative guidelines for the conduct of doping control shall be determined by the Doping Commission. These guidelines shall be known as the "Procedural Guidelines for Doping Control". These guidelines or any proposed amendment to them must be approved by the Council and shall come into force three months from the date of such approval.

11. A departure or departures from the procedures set out in the "Procedural Guidelines for Doping Control" shall not invalidate the finding that a prohibited substance was present in a sample or that a prohibited technique had been used, unless this departure, was such as to cast real doubt on the reliability of such a finding.

12. The IAAF or its Members may delegate the collection of samples to any Member, governmental agency or any other third party that they deem suitable.

* * * * *

RULE 59
Disciplinary Procedures for Doping Offences

1. Where a doping offence has taken place, disciplinary proceedings will take place in three stages:-
   (i) suspension;
   (ii) hearing;
   (iii) ineligibility.
2. The athlete shall be suspended from the time the IAAF, or, as appropriate, an Area or a Member, reports that there is evidence that a doping offence has taken place. Where doping control is the responsibility of the IAAF under IAAF Rule 58.1, the relevant suspension shall be imposed by the IAAF. Where doping control is the responsibility of an Area or a Member, the National Federation of the athlete shall impose the relevant suspension. If, in the opinion of the IAAF, a National Federation has failed properly to impose a suspension, the IAAF may itself impose that suspension.
3. Every athlete shall have the right to a hearing before the relevant tribunal of his National Federation, before any decision on eligibility is reached. When the athlete is notified that it is believed that a doping offence has taken place, he shall also be served with a notice informing him of his right to a hearing, together with a notice of application. If an athlete does not return this notice of application within 28 days of receipt, he will be deemed to have waived his right to a hearing.
4. If an athlete is found to have committed a doping offence, and this is confirmed after a hearing, or the

athlete waives his right to a hearing, he shall be declared ineligible. In addition, where testing was conducted in a competition, the athlete shall be disqualified from that competition and the result amended accordingly. His ineligibility shall begin from the date on which the sample was provided.

5. Where a hearing takes place, the IAAF or the member (as the case may be) shall have the burden of proving, beyond reasonable doubt, that a doping offence has been committed.

6. More detailed guidelines for the conduct of disciplinary procedures are to be found in the "Procedural Guidelines for Doping Control." See also Rules 21-23 and the IAAF "Guidelines for the Conduct of Arbitrations", for procedures to be followed when conducting hearings.

* * * * *

SCHEDULE 1

PROHIBITED SUBSTANCES

PART I

(a) Anabolic Agents

(I) Androgenic Anabolic Steroids e.g.

androstenedione
bolasterone
boldenone
chlordehydromsthyffestosterone
methyltestosterone
nandrolone
nomthandmlone

clostebol
dehydroepiandrosterone
dihydrotestosterone*
fiuoxymesterone
gestrinone
mesterolone
methandienone
methenolone
oxandrolone
oxymesterone
oxymetholone
stanozolol
testosterone**

and chemically or pharmacologically related compounds

* Dihydrotestosterone:, a sample will be deemed to be positive for dihydrotestosterone where the concentrations of dihydrotestosterone and its metabolites and/or their ratios to non-5alpha-steroids in urine so exceed the range of values normally found in humans as not to be consistent with normal endogenous production.

** Testosterone: a sample will be deemed to be positive for testosterone where either the ratio in urine of testosterone to epitestosterone, or the concentration of testosterone in urine, so exceeds the range of values normally found in humans as not to be consistent with normal endogenous production.

A sample will not be regarded as positive for dihydrotestosterone or testosterone where an athlete proves by clear and convincing evidence that the abnormal ratio or concentration is attributable to a pathological or physiological condition.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 201

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

36 U.S.C. § 220503

§ 220503. Purposes

The purposes of the corporation are–

* * *

(8) to provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition;

* * *

(11) to encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety;

(12) to encourage and provide assistance to amateur athletic activities for women;

36 U.S.C. § 220505

§ 220505. Powers

* * *

(c) Powers related to amateur athletics and the Olympic Games. The corporation may–

* * *

(5) facilitate, through orderly and effective administrative procedures, the resolution of conflicts or disputes that involve any of its members and any amateur athlete, coach, trainer, manager, administrator, official, national governing body, or amateur sports organization and that arise in connection with their eligibility for and participation in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, the Pan-American world championship competition, or other protected competition as defined in the constitution and bylaws of the corporation;

36 U.S.C. § 220509

§ 220509. Resolution of disputes

(a) General. The corporation shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to

participate in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, or other protected competition as defined in the constitution and bylaws of the corporation. In any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games, the Paralympic Games, or the Pan-American Games, a court shall not grant injunctive relief against the corporation within 21 days before the beginning of such games if the corporation, after consultation with the chair of the Athletes' Advisory Council, has provided a sworn statement in writing executed by an officer of the corporation to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games.

36 U.S.C. § 220522

§ 220522. Eligibility requirements

(a) General. An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it–

* * *

(4) agrees to submit to binding arbitration in any controversy involving–

(A) its recognition as a national governing body, as provided for in section 220529 of this title, upon demand of the corporation; and

(B) the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, upon demand of the corporation or any aggrieved amateur athlete, coach,

trainer, manager, administrator or official, conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws, except that if the Athletes' Advisory Council and National Governing Bodies' Council do not concur on any modifications to such Rules, and if the corporation's executive committee is not able to facilitate such concurrence, the Commercial Rules of Arbitration shall apply unless at least two-thirds of the corporation's board of directors approves modifications to such Rules;

* * *

(8) provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate;

36 U.S.C. § 220523

§ 220523. Authority of national governing bodies

(a) Authority. For the sport that it governs, a national governing body may–

* * *

(5) conduct amateur athletic competition, including national championships, and international amateur athletic competition in the United States, and establish

procedures for determining eligibility standards for participation in competition, except for amateur athletic competition specified in section 220526 of this title;